90-74

No. -

In the Supreme Court of the United States

OCTOBER TERM, 1989

BARBARA JACKSON,
PETITIONER,

v.

HARVARD UNIVERSITY AND JOHN McARTHUR,
RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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Blanchard Press, Inc., Boston, Mass. — Law Printers [617] 426-8890

QUESTIONS PRESENTED FOR REVIEW

1. Did the District Court's holding, which was affirmed by the Court of Appeals, that "disparate treatment analysis is concerned with intentional discrimination, not subconscious attitudes" and that "'subconscious stereotypes and prejudices' . . . are precisely the sort that disparate treatment analysis cannot and was never designed to police" interpret federal law in conflict with the applicable decisions of this Court?

2. Was Petitioner, the plaintiff in an action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq*, who employed the indirect method of proof under *Texas Dep't. of Community Affairs* v. *Burdine*, 450 U.S. 248 (1981), required to present additional evidence of gender-based discrimination after she had proved the defendants' articulated non-discriminatory reason for denying her tenure false?

3. Was the defendant in an action under Title VII of the Civil Rights Act of 1964 permitted to change its articulated non-discriminatory reason for denying plaintiff tenure from failure to meet its written criteria for tenure to failure to obtain a sufficient affirmative vote of the tenured faculty after discovery was closed and defendant had shielded the individual faculty members' votes from discovery by invocation of "academic privilege?"

TABLE OF CITATIONS

Statutes:

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Opinions Below

1. *Jackson* v. *Harvard University*, 721 F.Supp. 1397 (D.Mass. 1989).
2. *Jackson* v. *Harvard University*, 900 F.2d 464 (1st Cir. 1990).

Basis For Jurisdiction

The judgment of the United States Court of Appeals for the First Circuit was entered on April 9, 1990. Jurisdiction is conferred by 28 U.S.C. §1254.

Statute Involved

Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, *et seq.*

Statement of the Case

Procedural History

This is an action brought in the United States District Court for the District of Massachusetts under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.*, by Barbara Jackson against Harvard University and John McArthur, the Dean of the Graduate School of Business Administration (hereafter, collectively, the defendants), arising out of the denial of tenure. Following denial of the defendants' motion for summary judgment, the case was tried in May and June of 1988 on the issue of liability only, the court having allowed defendants' motion to bifurcate the trial. On August 14, 1989, the District Court entered judgment in favor of the defendants. The United States Court of Appeals for the First Circuit affirmed on April 9, 1990.

Facts

Jackson joined the Harvard Business School faculty in 1973 as an Assistant Professor; in 1977 she was promoted to Associate Professor. In 1977 she began a gradual transfer of her field of specialization from Managerial Economics to Marketing, after being assured that her work in Managerial Economics and the brevity of her exposure to Marketing would be taken into consideration in her review for tenure. 721 F.Supp. at 1415.

A tenure candidate at the Business School is first reviewed by a subcommittee, which measures the candidate's record against the standards set forth in the Business School's "Policies

and Procedures with Respect to Faculty Appointments and Promotions" and then writes a report of its findings. Until 1982, different subcommittees were appointed by the dean for different candidates; candidates were asked to inform the dean of individuals they did not want to be on their subcommittees and such requests were routinely honored. Since 1982, a standing subcommittee has reviewed all candidates in a year. The subcommittee report is presented to the entire tenured faculty (the "Full Committee"), which ordinarily meets twice, with the dean presiding, to consider each candidate and which votes by signed ballot at the end of each meeting. Although the vote is officially only advisory, in practice the dean does not recommend tenure without a substantial majority vote. The dean's decision whether or not to recommend tenure is *de facto* final. 721 F.Supp. at 1415-1416.

According to Senior Associate Dean Gordon Donaldson, who managed the tenure review process for about ten years, the subcommittee report is the most objective way available for comparing various tenure candidates. The significance of a favorable report is best illustrated by the fact that, except for Jackson, in the history of the School, every candidate who received a unanimous subcommittee tenure recommendation ultimately received tenure and by Dean Donaldson's testimony that, based on her 1981 report, he expected Jackson to receive tenure. 721 F.Supp. at 1440.

Jackson was reviewed for tenure in 1981. When asked, she requested that four people be excluded from the subcommittee that would evaluate her work. Professor Stephen Bradley was put on the subcommittee despite her specific request that he be excluded because of his bias against women. Bradley was the only subcommittee member to vote that Jackson did not meet the standards, although he did vote that she should be granted tenure as an exception. The District Court found that disregarding Jackson's request constituted disparate treatment because her "request to exclude Bradley was not accorded the same deference apparently afforded similar exclusionary requests by male candidates". 721 F.Supp. at 1433-1434.

This case involves the Business School's "Policies and Procedures with Respect to Faculty Appointments and Promotions." Those standards require a candidate to demonstrate excellence in research *or* course development. Excellence in course development (which is the same as creativity in course development) can be demonstrated in at least *one* of three ways:

> a) development of new concepts b) application of concepts already known in one field to a quite different field and c) development of pedagogical approaches which greatly increase the ability of students of management to make use of the relevant parts of subjects previously taught in other ways for other purposes. 721 F.Supp. at 1436.

The bulk of Jackson's work had been course development rather than research. Her 1981 subcommittee report found that her written (course development) materials demonstrate pedagogical creativity. The District Court found that it is impossible to read the report and conclude that the finding of pedagogical creativity is not equivalent to a finding that Jackson met the requirement of creativity (in the way labeled "c") with respect to her key course development work. 721 F.Supp. at 1437.

The Full Committee discussed Jackson's candidacy on November 17, 1981. Professor Herzlinger, the only woman member (and one of just two tenured women in the history of the school, 721 F.Supp. at 1429), testified that there was much more discussion of personality than in the usual case. 721 F.Supp. at 1435. In the vote at the end of the meeting, 47 members (including all 8 from the marketing area) voted for promotion, 7 for termination, 1 for reappointment without tenure and 6 abstained. It is undisputed that this vote showed the substantial majority required for tenure.[1] Twenty-five

[1] The outcome of the first vote was withheld by the defendants until the start of the third day of trial, when questioning by the District Judge and

days later, on the second ballot, there were only 29 votes to promote (with 27 to terminate, 8 to reappoint and 4 abstentions).[2] 721 F.Supp. at 1420.

Jackson's tenure review process was held in abeyance and her appointment extended ostensibly to allow her to prove her creative capacity and thereby qualify for tenure. 721 F.Supp. at 1421. She was considered again for tenure in 1983. While it was agreed that the 1981 Full Committee discussion focused on Jackson's ability to develop new ideas and that the extension was intended to allow her to show that capacity,[3] the standard for review stated in the 1983 subcommittee report purports to require Jackson to produce work which would "establish her reputation as a respected researcher in marketing." 721 F.Supp. 1424-1425. Jackson contends that since she qualified for tenure in 1981, and since the 1983 standard was dramatically higher than that applied to men, the continuation of her tenure review in 1983 constituted additional sex discrimination. The 1983 subcommittee limited its evaluation to the monograph she produced for the purpose of the ex-

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Jackson's attorney established that defendants had not produced requested documents. After the judge's order, the documents were finally produced and the tally sheet revealing that vote was introduced by Jackson on the sixth day.

[2] Two pieces of evidence explain the shift in vote (contrary to the District Judge's statement that he did not receive evidence on that subject — 721 F.Supp. at 1400). Professor Stevenson testified without contradiction that McArthur described his own role in Jackson's tenure review as that of a prosecuting attorney to get at the "true feelings." Documents that were withheld by the defendants until after the end of the trial (necessitating a Motion to Reopen the record) contained letters to McArthur countering points he had been making in opposition to Jackson's candidacy, thereby corroborating the prosecuting-attorney remark. Since McArthur had told Jackson, in substance, that women would not be promoted unless the government imposed quotas, 721 F.Supp. at 1433, and had denied on the witness stand that he had played any active role for or against her candidacy, the conclusion is plain that the clandestine prosecutor was acting out of his expressed bias against promoting women.

[3] The District Court's pre-trial Order adopted a procedure whereby the parties exchanged proposed findings and rulings; those which were unmarked, either by underlining or bracketing, were deemed admitted.

tended review, using the respected-researcher standard. *Ibid.* The standard was found by the District Judge to be "extraordinarily ambitious." 721 F.Supp. at 1426. Jackson received only a slight majority on the second vote in 1983 and McArthur did not recommend tenure. 721 F.Supp. at 1427.

Jackson left the Business School in 1984. She filed a complaint with the Massachusetts Commission Against Discrimination in May 1984. She subsequently obtained a right to sue letter from the EEOC and brought this case in the District Court in December, 1984. 721 F.Supp. at 1428.

The defendants articulated several variants of their "legitimate" nondiscriminatory reason for denying Jackson tenure. In response to plaintiff's first set of interrogatories they said that "Barbara Jackson's demonstrated qualifications were insufficient to meet the standard for appointment with tenure of Harvard's Graduate School of Business Administration." In response to Jackson's second set of interrogatories the defendants stated that "tenure was denied because plaintiff's demonstrated scholarship did not meet the standard of excellence required for promotion to tenure." Defendants' motion for summary judgment gave the reason as "deficient scholarship" and they subsequently agreed at trial that the articulated reason was deficient scholarship.

Once the trial was underway, the defendants argued and the District Judge accepted as the legitimate nondiscriminatory reason for denying tenure that Jackson had failed to obtain a sufficient number of affirmative faculty votes. 721 F.Supp. at 1443.[4] Jackson contends that, since she clearly met

[4] The District Judge says: "[t]he decision was the result of a determination by a significant portion of the tenured faculty that Ms. Jackson lacked sufficient qualities of creativity to justify extending a tenured appointment to her." Since not a single faculty member testified to that fact, and all who did testify stated Jackson met the qualifications for tenure, it is plain that the District Judge is equating individual faculty members' negative votes on granting tenure with endorsement of defendants' articulated reason, a connection which cannot be made on the record of this case. Moreover, the defendants shielded the reasons for the individual faculty members' votes from discovery under a claim of "academic privilege." 721 F.Supp. at 1401.

the standards in 1981 and, in any event, comparison of her subcommittee report with those of successful male candidates shows that she was in fact held to a higher standard than they were, she proved a violation of Title VII.

Argument

THE UNITED STATES COURT OF APPEALS HAS DECIDED IMPORTANT QUESTIONS OF FEDERAL LAW IN CONFLICT WITH THE APPLICABLE DECISIONS OF THIS COURT.

The petitioner claimed seven errors of law were committed by the District Court and presses the most critical of those in this petition.[5] The opinion of the First Circuit does not address the errors individually. Instead it gives a blanket endorsement to the District Court's application of the law: "[t]he trial judge

[5] We contended that the most significant errors of law committed by the District Court are the following:

1. The District Court ruled that "subconscious stereotypes and prejudices" are beyond the reach of Title VII.

2. The District Court ruled that it was "irrelevant" whether Jackson was more qualified than were men who were granted tenure, thereby allowing defendants to hold her to a higher standard with impunity.

3. After making subsidiary findings that show Jackson had proven false the defendants' articulated reason for denying her tenure, the District Judge required that she prove in addition that sex discrimination was the only possible explanation for the decision.

4. The District Court allowed the defendants to change their articulated reason for denying Jackson tenure. Their pre-trial statement (which framed the factual issues for discovery) was that her "demonstrated qualifications were insufficient to meet the standard for appointment for tenure." The reason the court allowed the defendants to rely on at trial was that Jackson received an insufficient faculty vote. Since there was by that time no way to determine why the individual faculty members voted as they did, the District Court thus rendered defendants' articulated reason immune from effective judicial inquiry.

5. The District Court allowed the defendants to rely on the faculty vote after they had invoked "academic privilege" to prevent discovery of individual faculty members' votes and reasons and after the court had said that the defendants would not be allowed to offer at trial any evidence as to matters which they had thereby shielded from discovery.

correctly understood and applied the substantive and procedural rules for probing sex discrimination in the context of academic tenure disputes." 900 F.2d at 468. The Court of Appeals affirmed the District Court by relying upon the "clearly erroneous" standard for reviewing findings of fact set forth in Fed. R. Civ. P. 52. *Ibid.* It did not analyze how the District Judge's errors of law led to erroneous mixed findings of fact and law on the ultimate issue in the case. Consequently the decision of the First Circuit was simply a conduit for the errors of the District Judge. The Court of Appeals adopted those errors as its own. In so doing the Court of Appeals decided important questions of law in conflict with applicable decisions of this Court.

A. *The* Burdine *Formulation Is Designed To Remedy Discrimination Which Is Based On Either Conscious Bias Or Subconscious Stereotypes And Prejudices.*

The methodology of proving a violation of Title VII in the absence of direct evidence of discrimination crystallized in *Texas Dept. of Community Affairs* v. *Burdine, supra,* is essentially straightforward. First, the plaintiff must make out a prima facie case in accordance with the allocation of burdens and order of presentation of proof set forth in *McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792 (1973), thereby raising a presumption that the employment decision in issue was the product of illegal bias. The burden then shifts to the defendant, but only to articulate a legitimate non-discriminatory

6. By deferring to the conclusions of certain Harvard faculty members who did not interpret the evidence as proving discrimination and by emphasizing that no faculty member testified to a belief that the decision was based on gender, the District Court seems to put academic tenure decisions beyond the reach of Title VII unless participants in those decisions testify that they were discriminatory.

7. By allowing a defendant university to engage with impunity in misconduct that would not be tolerated in a commercial employer, the District Court virtually eliminates the academic Title VII plaintiff's chances of "ferreting out . . . invidious discrimination" in institutions of higher learning.

reason for the decision. The plaintiff must then prove that the articulated reason was not the true reason, but a pretext for discrimination. According to *Burdine*, the articulated reason sets the factual inquiry in the case.

> Placing this burden of production on the defendant thus serves simultaneously to meet the plaintiff's prima facie case by presenting a legitimate reason for the action and *to frame the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext*. 450 U.S. at 255-256 [emphasis added].

The final step may be accomplished "either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." 450 U.S. at 256. In other words, if the plaintiff proves that the articulated reason is false, she proves her case. For examples of the First Circuit's correct application of the rule in a setting which does not involve academic tenure *see Townsend* v. *Gray Line Bus Co.*, 767 F.2d 11, 20 fn.6 (1st Cir. 1985); *Hallquist* v. *Local 276 Plumbers and Pipefitters Union, AFL-CIO*, 843 F.2d 18, 23-24 (1st Cir. 1988).

The District Court wrongly required Jackson to go beyond proving the articulated reason false by requiring her to prove that there was no other possible reason for the defendants' action other than sex bias. To do so was a serious error of law because it imposed a higher burden on the Title VII plaintiff than is allowed under *Burdine*. When a Title VII plaintiff sets out to bag the defendant's articulated reason she must kill it, not just wound it. But she need do no more.

Jackson introduced compelling evidence that, at the very least, subconscious stereotypes and prejudices played a motivating part in the tenure process at the Business School. Donaldson, who was in a unique position to know, opined

that "it is more difficult for women to become tenured members of the faculty than for men," basing his opinion on his belief that "there's a reluctance to accept women into certain leadership roles in certain areas where they traditionally have not had such roles." 721 F.Supp. at 1432. "It takes no special training to discern" that Donaldson was presenting a classic description of the effect of sex stereotyping. *Price Waterhouse* v. *Hopkins*, ___ U.S. ___, 109 S.Ct. 1775, 1793 (1989). The degree of additional difficulty for women is calibrated by the finding that when Jackson's tenure review began in 1981 there was only one tenured woman professor out of about eighty and she was only the second tenured woman in the history of the Business School and by the finding that Jackson "is the only Business School tenure candidate who ever received a unanimous subcommittee tenure recommendation without *ultimately* receiving tenure." 721 F.Supp. at 1440.

There were other specific instances where sex stereotyping played a part in Jackson's review. The court accepted Professor Herzlinger's testimony that "[i]n the discussions of Barbara Jackson's candidacy for tenure, . . . there was much more discussion of personality than in the usual case." 721 F.Supp. at 1435. In addition:

> The most enthusiastic 1981 outside reviewer of plaintiff's written work was asked whether affirmative action considerations had played any role in his review. No similar question was asked of plaintiff's least enthusiastic reviewer or of any reviewer of any work by a male tenure candidate. 721 F.Supp. at 1434.

Although the District Judge found this event to be "peculiar and unsettling" he thought it no more than "marginally significant as circumstantial evidence of gender bias." 721 F.Supp. at 1435. We submit however that this "disparate treatment" is highly significant because it reflects the stereotype that women are incapable of producing work meriting

such a favorable review. Incredibly, the District Judge did not appreciate the significance of his findings. His error, adopted and endorsed by the Court of Appeals, was to hold that Title VII could not reach discrimination which was the product of "subconscious stereotypes and prejudices." 721 F.Supp. at 1433.

To appreciate the enormous impact of this error on Title VII jurisprudence one need only follow its consequences in the District Court's decision. If subconscious stereotypes and prejudices are not relevant, as the lower courts held, then a Title VII plaintiff must either obtain a confession of conscious bias or disprove every possible benign explanation. Both of these lines of logic are evident in the District Court's opinion.

First, the District Judge relied on the perceptions of Harvard's employees that there was no bias despite the fact that he found specific instances of disparate treatment and other evidence of stereotypes and prejudices. The District Judge noted the testimony of Professor Herzlinger, the only tenured woman in 1981 and 1983, that in the full committee discussions of Jackson's candidacy "there was much more discussion of personality than in the usual case." While recognizing that under *Price Waterhouse* v. *Hopkins*, *supra*, 109 S.Ct. at 1790-1 (1989) the discussion of personality described by Herzlinger would constitute evidence of sex discrimination, the judge dismissed the evidence because Herzlinger did not share this Court's view of its significance. 721 F.Supp. at 1435-1436. The problem surfaces again in the court's treatment of Professor Stevenson's testimony that the standard applied to Jackson in 1983 was "impossible." The court dismissed Stevenson's testimony because Stevenson said he could not identify anything in the tenure process concerning Jackson that indicated sex bias. 721 F.Supp. at 1428.

If Jackson was measured against an impossible standard, while men were not, then there has clearly been discrimination. Stevenson, however, did not know enough about Title VII to recognize that fact. Nor should he be required to. It is

manifestly the District Court's job to know and apply the law and not to defer to the conclusions of an employee of the defendant institution. The District Judge makes the same error when he emphasizes that no one from Harvard came forward to say there was discrimination. 721 F.Supp. at 1399, 1428.

Ironically, when Senior Associate Dean Donaldson, who managed the tenure process, testified that he believed that it was more difficult for women to achieve tenure because the Business School reflected the biases of society, the District Judge dismissed that evidence. While Jackson contended that "Title VII exists because what society does is wrong" and therefore obliges the Business School to rise above the prejudices of society the District Court's rejoinder was to hold that Title VII could not reach discrimination which was the product of "subconscious stereotypes and prejudices." The District Judge stated that "recognition that Harvard is not insulated from the consequences of more general societal attitudes that continue to pervade our culture does not signal a violation of Title VII at the Business School." 721 F.Supp. at 1432. In other words, if a University's bias against women is the product of general societal attitudes it is not illegal. However, *Price Waterhouse*, in holding that "[i]n the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive or that she must not be, has acted on the basis of gender" 109 S.Ct. at 1790-1, shows that the District Judge was wrong.

> [W]hen plaintiffs establish that decisions regarding . . . employment are motivated by discriminatory attitudes relating to race or sex, or are rooted in concepts which reflect such attitudes, however subtly, courts are obligated to afford the relief provided by Title VII. *Lynn* v. *Regents of the University of California*, 656 F.2d 1337, 1343 fn. 5 (9th Cir. 1981), *cert. den.*, 459 U.S. 823 (1982).

The second line of logic flowing from the fundamental error about subconscious stereotypes and prejudices is reflected in the District Court's requirement that Jackson disprove every benign explanation for the outcome of the faculty deliberations.[6]

> The question is whether a substantial portion of the 1981 Full Committee could have legitimately concluded, on the basis of a fair reading of the 1977 Standards and plaintiff's 1981 Subcommittee Report, that plaintiff had not satisfied the creative course development requisite as of December, 1981. The answer to this latter query is yes. 721 F.Supp. at 1437.

The District Court's opinion dramatically illustrates how the error of putting bias based upon subconscious stereotypes and prejudices outside the purview of Title VII effectively places discrimination in academic tenure beyond the reach of the law by requiring the plaintiff to prove that there was conscious, deliberate discrimination. In contrast, this Court has recently reaffirmed unequivocally the "great if not compelling governmental interest" in "ferreting out" "racial and sexual discrimination in institutions of higher learning." *University of Pennsylvania* v. *Equal Opportunity Commission*, ____ U.S. ____, 110 S.Ct. 577 (1990). The decisions below are thus manifestly in conflict with the decisions of this Court.

B. *Since, Under* Burdine *The Defendant's Articulated Reason Frames The Factual Issue, The Defendant May Not Change That Reason After Discovery Is Completed And Once A Plaintiff Has Proven The Articulated Reason False She Prevails.*

Jackson proved that the defendants' articulated reason for denying tenure was false but the District Court erroneously

[6] As we argue below this was doubly erroneous because the District Court allowed the defendants to change their articulated reason after discovery was concluded and after they had shielded the individual faculty votes from discovery by claiming "academic privilege."

allowed the defendants to change their articulated reason after discovery was concluded. It was agreed that Jackson had made out a prima facie case under the *McDonnell Douglas* v. *Green* formulation. Accordingly, to "frame the factual issue" in this case, the defendants' articulated in response to plaintiff's first set of interrogatories that "Barbara Jackson's demonstrated qualifications were insufficient to meet the standard for appointment with tenure of Harvard's Graduate School of Business Administration". In response to Jackson's second set of interrogatories the defendants stated that "tenure was denied because plaintiff's demonstrated scholarship did not meet the standard of excellence required for promotion to tenure". Defendants' motion for summary judgment gave the reason as "deficient scholarship" and they subsequently left unmarked (i.e. did not object to) Jackson's proposed finding of fact that the articulated reason was deficient scholarship.

Defendants sharpened the focus of inquiry by asserting that "[t]he standard by which plaintiff was measured was no different from the standard by which male candidates for tenure were measured" and more specifically that "no male candidate presenting the same record as Barbara Jackson presented to the Full Committee would have secured its support, nor the Dean's recommendation". As District Judge Garrity succinctly put the issue in requiring the defendants to produce the tenure files of successful male candidates, "defendants' position is that plaintiff failed to meet Harvard's criteria for tenure." *Jackson* v. *Harvard University*, 111 F.R.D. 472, 475 (D.Mass. 1986). Ultimately the reason was refined to whether Jackson possessed "sufficient creativity" under the tenure standards.[7] 721 F.Supp. at 1436.

The defendants having thus framed the factual issue, plaintiff set out to prove that she had met the standard and that less

[7] The advantages to the defendants of having misdirected discovery are manifest. Defendants successfully claimed "academic privilege" to prevent discovery of "the particulars of tenure discussions and evaluations." 721 F.Supp. 1401. Had they made the faculty vote itself an issue before trial they would have risked voiding the privilege.

qualified males had been granted tenure. Plaintiff's method was to put before the court the conclusions of the subcommittee reports, the most objective way available to compare the candidates, in order to show that her report concluded she had met the creativity standard, that male candidates with less favorable conclusions as to creativity were granted tenure, and that she was held to a higher standard than were successful males.[8] The District Judge reviewed the reports offered by Jackson and found the conclusions as to creativity of successful males to be "more or less equivocal". 721 F.Supp. at 1439. The District Judge agreed that the standards had been "adjusted" for two male candidates. 721 F.Supp. at 1442. Indeed, the trial judge appears to have concluded that it was likely that

[8] In this regard Jackson was severely hampered by the defendants' destruction of the subcommittee reports after they were served with a request for production and while Jackson's motion to compel was awaiting a ruling from the District Judge.

Along with the complaint, defendants were served in December 1984 with a request for production of documents, including tenure records. 721 F.Supp. at 1408. Marrilyn Reid, Secretary to the Faculty, had custody of the tenure records. In the fall of 1985, Reid worked with Amy Sugerman, the Business School's records analyst, to select and box files to be sent to the University's Inactive Records Center. Reid was "well aware" that the tenure files were needed for this litigation. She and Sugerman nevertheless sent them to the center and Sugerman told Joan Glasser, the staff assistant to Richard Haas (who headed the center) that the records were to be destroyed. When the tenure records arrived at the center, they were placed in the area reserved for materials to be incinerated. 721 F.Supp. at 1409-1410.

Under a University policy, in place since 1939, no records could be destroyed without a completed disposition application, containing four signatures (those of the department chairman, the appropriate librarian, the Secretary of the Harvard Corporation, and the director of the University's library). 721 F.Supp. at 1409 fn.7. The Inactive Records Center required that the completed disposition application be received before it would accept documents. In this case, however, the center accepted the tenure records without the required form because, as found by the District Judge, Haas was doing a favor for Sugerman.

The records were destroyed in April or May 1986. The District Judge found that they were the only records of any sort to have been destroyed without a completed disposition application since the advent of the 1939 University-wide policy regarding records retention, but drew no negative inference against the defendants. 721 F.Supp. at 1410, 1412-1413.

Jackson was more qualified than tenured males. 721 F.Supp. at 1443.

The District Court found that, under the applicable standards, Jackson could have demonstrated sufficient scholarship (which the promotion standards call "excellence") either through her research or through her course development. The District Court concluded that "despite defendants' protestations to the contrary, it is impossible to read [Jackson's] 1981 Subcommittee Report" without concluding that she had met the requirement of excellence (in course development) with respect to her key work.[9] 721 F.Supp. at 1437.

Indeed, the evidence that Jackson had met the tenure standard in 1981 was overwhelming. The subcommittee which reviewed her said so by a 3 to 1 vote, the dissenter being Professor Bradley, a man she had attempted to keep off the subcommittee because of his bias against women. 721 F.Supp. at 1417. The District Court found that putting Bradley on the subcommittee constituted disparate treatment of Jackson because her request to exclude him "was not accorded the same deference apparently afforded similar exclusionary requests by male candidates" but rationalized this obvious discrimination away because Bradley voted to promote Jackson as "an exception". 721 F.Supp. at 1417, 1434. Based on her subcommittee report, Dean Donaldson, the most experienced observer of the tenure process, thought she would be promoted. Even McArthur had to concede that she had met the standard. Against that impressive array of proof, there was no evidence that she had not met the standard in 1981. Most, if not all, of the witnesses offered by the defendants affirmed their belief that she was qualified, as did Professor Stevenson. Not a single witness testified that Jackson did not meet that standard in 1981. The only contrary evidence was the fact that after initially approving promotion, less than half the faculty changed their vote. But, as the District Judge remarked during

[9] The District Court's statement actually concerned creativity in course development, but the court also found that excellence in course development and creativity in course development are the same.

the defendants' closing argument, faculty members do not vote whether candidates meet the standards; they vote whether to promote. The District Judge seems to have concluded that Jackson did meet the written standard. But, blinded by legal error, he did not reach the conclusion that Jackson had proven the defendants' articulated reason false and therefore was entitled to judgment in her favor as required under the *Burdine* methodology. Rather, he concluded that Jackson had produced no evidence of discrimination.[10]

To the contrary, because Jackson had proven without contradiction that she met the standard, she had proven that the articulated reason (that she had failed to meet the standards for tenure because of deficient scholarship) was "unworthy of credence." She thereby satisfied the final step in the *Burdine* process.

The District Court sidestepped the force of *Burdine's* logic by allowing the defendants to change their articulated reason in a subtle but extremely important way just as the trial was about to begin. The new reason was that "a substantial number of the members of the Full Committee determined that Jackson's scholarship did not meet the standards for promotion to tenure at the Business School". For the first time, the defendants made the vote rather than Jackson's scholarship the issue. Without even acknowledging that the defendants' articulated reason had substantially changed, the District Court imposed on Jackson the burden of proving pretextual a reason that was not even articulated until discovery was over.[11] In so

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[10] The District Judge's error seems to have infected the case even before the trial began. He noted in his decision that "[v]iewing the appropriate judgment as extraordinarily clear, I was prepared to decide this case from the bench adversely to the plaintiff with an *ore tenus* decision dictated into the record" 721 F.Supp. at 1400-1401. The pre-trial Order suggests that he had made the decision to "seek to decide the case immediately after oral argument at the conclusion of trial" over two months before hearing the first witness.

[11] Even if the defendants' original articulated reason *had* relied on the vote, their use of academic privilege and their withholding of evidence wrongly deprived Jackson of "a full and fair opportunity to demonstrate pretext."

doing, the court allowed the defendants to change the issue from the relatively objective original question of whether Jackson had met the formal standard to the highly subjective question of whether individual faculty members *could* have legitimately concluded that she did not.[12] 721 F.Supp. at 1437.

As a result, the inquiry became whether the faculty *could* have concluded that Jackson had not met the standard without consciously acting from impermissible motives. Thus, having proven the articulated reason false and shown that she was held to a higher standard than were men, Jackson was required in effect to disprove the good faith of the individual faculty members who voted against her by showing that they could not have reached their conclusions without bias.

If this formulation of the plaintiff's burden is allowed to stand, it will be impossible to apply Title VII to academic tenure decisions, contrary to the manifest will of Congress and the clear direction of this Court. *University of Pennsylvania* v. *Equal Employment Opportunity Commission*, *supra*. The District Court's formulation "would virtually insulate the university from review of any tenure decision, including those based on impermissible discrimination." *Brown* v. *Trustees of Boston University*, 891 F.2d 337 (1st Cir. 1989).

Even if there are some cases in which Title VII plaintiffs must shoulder the heavy burden of delving into the mental processes behind the individual votes of the members of a group, this is not one of them. The defendants did not frame the factual issues to include the legitimacy of the vote *per se*. Since the purpose of requiring the defendant to articulate a legitimate nondiscriminatory reason is "to frame the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext," *Texas Dept. of Community Affairs* v. *Burdine*, *supra*, 450 U.S. 255-256, a defendant should not be allowed to set the discovery on one

[12] The District Court was thus doubly wrong in asking not whether the individual faculty members *did* reach legitimate conclusions, but whether they could have done so.

path by articulating one reason and then rely on a different reason at trial.

Moreover, the defendants should not have been allowed to rely upon the vote because they successfully invoked "academic privilege" to shield from discovery the how and why of individual votes. 721 F.Supp. at 1401. Having allowed the defendants to claim "academic privilege" to prevent Jackson from inquiring into the reasons for the faculty vote, it was error for the District Judge to permit reliance on the vote to defeat Jackson's claim. *Equal Employment Opportunity Commission* v. *General Telephone Company of Northwest, Inc.*, 885 F.2d 575, 578 (9th Cir. 1989). *See, Greater Newburyport Clamshell Alliance* v. *Public Service Company of New Hampshire*, 838 F.2d 13, 20 (1st Cir. 1988) ["a privileged party cannot fairly be permitted to disclose as much as he pleases and then to withhold the remainder to the detriment of the defendant"]. *See, also, Patriot Cinemas, Inc.* v. *General Cinema Corp.*, 834 F.2d 208, 209 (1st Cir. 1987) [doctrine of judicial estoppel prevents "intentional self-contradiction" from being used "as a means of obtaining unfair advantage"].

Once the defendants used academic privilege to block Jackson's inquiry into some individual faculty members' votes, Jackson was entitled to rely on the District Judge's pre-trial admonition to the defendants that he would not permit testimony "from any person on behalf of Harvard who falls in a class of persons as to whom the privilege has been asserted by Harvard during the course of discovery". The court recognized that faculty members' votes could not be "selectively revealed". In other words, the defendants could not allow witnesses that they considered helpful to reveal their votes while blocking inquiry into the votes of others.[13] Having allowed Jackson to rely on its assurance that once academic privilege was invoked in discovery the topic as to which it was asserted would not be the subject of testimony by anybody at trial, it

[13] Such inquiry would include both how the individual voted and the reasons behind the vote.

was error for the court to admit defendants' evidence about the votes and to require Jackson to refute it.[14]

The error regarding the use of the faculty vote compounds the fundamental error concerning the role of the articulated reason in the *Burdine* framework. Accordingly, the First Circuit's adoption of the District Court's errors sets a dangerous precedent which will effectively eliminate the application of Title VII to academic tenure decisions contrary to the decisions of this Court.

Conclusion

For the foregoing reasons the petitioner Barbara Jackson respectfully submits that her petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit should be granted.

By her attorney,

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[14] We recognize that it was Jackson who introduced the withheld tally sheet of the 1981 votes which showed that on the first ballot she had sufficient faculty support. She did so, however, only after the District Judge had overruled her objections and allowed defendants to present evidence regarding the vote.

ADDENDUM

United States Court of Appeals
For the First Circuit

No. 89-1931

BARBARA JACKSON,
PLAINTIFF, APPELLANT,

v.

HARVARD UNIVERSITY, ET AL.,
DEFENDANTS, APPELLEES.

Heard Feb. 9, 1990
Decided April 9, 1990.

Evan T. Lawson with whom *Lawson & Weitzen*, Boston, Mass., was on brief, for plaintiff, appellant.

Allan A. Ryan, Jr., with whom *Daniel Steiner*, Cambridge, Mass., *George Marshall Moriarty*, and *Ropes and Gray*, Boston, Mass., were on brief, for defendants, appellees.

Before CAMPBELL, *Chief Judge*,
SELYA and CYR, *Circuit Judges*.

SELYA, *Circuit Judge*.

In 1983, Harvard Unversity (Harvard or the University) declined to offer tenure at its Graduate School of Business Administration (the Business School) to plaintiff-appellant Barbara Jackson. Jackson sued under Title VII of the Civil Rights

Act of 1964, 42 U.S.C. §§ 2000e through 2000e-17 (1982), charging gender-based discrimination. She named as defendants both the University and the dean of the Business School, John McArthur. After a bench trial, the United States District Court for the District of Massachusetts ruled against her. *Jackson* v. *Harvard Univ.*, 721 F.Supp. 1397 (D.Mass. 1989). Having carefully considered plaintiff's arguments on appeal and digested the rather imposing record, we find no significant legal error and therefore affirm.

I. BACKGROUND

The evidence is exhaustively and accurately detailed in the opinion below, *id.* at 1399-1401, 1415-28, and it would be pleonastic to rehearse it here. We offer instead a synopsis designed to do no more than give needed context to the legal principles involved.

Tenure decisions at the Busines School are subject to an exacting protocol. A subcommittee comprised of four faculty members measures the aspirant against the prescribed standards and presents an advisory report to the tenured faculty as a whole. The full faculty conducts its own review of the candidate. Two votes are taken by signed ballot, some weeks apart. While these tallies are not binding *stricto senso*, the dean will generally not recommend tenure to Harvard's president and governing boards unless a candidate commands substantial majority support within the faculty. As a practical matter, a decision by the dean not to recommend tenure is final.

Appellant began teaching at the Business School in 1973 with the rank of assistant professor. In 1977, she was promoted to associate professor. She was considered for tenure twice. At her 1981 review, she requested that certain faculty members be excluded from the first-level subcommittee. Such requests are not uncommon and are, for the most part, routinely allowed. In this instance, Jackson's wishes were honored with

one exception: Professor Stephen Bradley was retained on the subcommittee despite Jackson's claim that Bradley was biased against women.

The subcommittee, including Bradley, performed its assigned functions. In general, the subcommittee's evaluation was favorable. Three of the members believed that Jackson merited tenure and that her main work, a book, met the required scholastic standards. Bradley disagreed with his colleagues' assessment of the book but voted to recommend tenure notwithstanding. At the first meeting of the tenured faculty, a substantial majority of those present favored appellant's promotion. In the final ballotting, however, that majority evaporated and the faculty split rather evenly.

The Business School temporized: Jackson's appointment was extended for three years and her tenure review held in abeyance. Appellant acquiesced in this arrangement. When she was reconsidered for tenure in 1983, however, she received only a slim majority in the vote of the full faculty. Eventually, tenure was denied. This Litigation followed in due season.

II. STANDARD OF REVIEW

[1] The standard of review is crucial to the appellate task in this fact-intensive environment. "When a district court sits without a jury, the court of appeals cannot undertake to decide factual issues afresh." *Reliance Steel Prod. Co.* v. *Nat'l Fire Ins. Co.*, 880 F.2d 575, 576 (1st Cir. 1989). Rather, constrained by the Civil Rules,[1] we review factual findings

[1] The Civil Rules provide in pertinent part:

> In all actions tried upon the facts without a jury ... the court shall find the facts specially and state separately its conclusions of law thereon ... Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.
>
> Fed.R.Civ.P. 52(a).

only for clear error. *Keyes* v. *Secretary of the Navy*, 853 F.2d 1016, 1019 (1st Cir. 1988); *Irons* v. *FBI*, 811 F.2d 681, 684 (1st Cir. 1987); *Johnson* v. *Allyn & Bacon, Inc.*, 731 F.2d 64, 71 (1st Cir.), *cert. denied*, 469 U.S. 1018, 105 S.Ct. 433, 83 L.Ed.2d 359 (1984). Fidelity to Rule 52(a) means that deference must be paid to the findings below: "It is not enough that [an appellate court] might give the facts another construction, resolve the ambiguities differently, and find a more sinister cast to actions which the district court apparently deemed innocent." *United States* v. *Nat'l Assoc. of Real Estate Boards*, 339 U.S. 485, 495, 70 S.Ct. 711, 717, 94 L.Ed. 1007 (1950); *see also Keyes*, 853 F.2d at 1020. Put bluntly, "[a]ppellate review of complex, fact-dominated issues cannot be allowed to descend to the level of Monday-morning quarterbacking." *Anderson* v. *Beatrice Foods Co.*, 900 F.2d 388 at 392-393 (1st Cir. Mar. 26, 1990). At the bottom line, "[W]here there are two permissible views of the evidence, the fact-finder's choice between them cannot be clearly erroneous." *Anderson* v. *City of Bessemer City*, 470 U.S. 564, 574, 105 S.Ct. 1504, 1511, 84 L.Ed.2d 518 (1985).

III. THE MERITS

[2] Visualizing the record through the prism of Rule 52(a) clarifies the result we must reach. We do not pause to restate the recognized burden-shifting framework characteristic of Title VII cases involving circumstantial proof of discrimination, *see e.g.*, *Texas Dept. of Community Affairs* v. *Burdine*, 450 U.S. 248, 252-56, 101 S.Ct. 1089, 1093-95, 67 L.Ed.2d 207 (1981); *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802-05, 93 S.Ct. 1817, 1824-1826, 36 L.Ed.2d 668 (1973); *Keyes*, 853 F.2d at 1023, but assume the reader's familarity with so commonplace a rule. The record leaves no doubt but that the first two steps in the *Burdine* pavane were accomplished: (1) appellant made out a prima facie case and (2) defendants articulated a reason (failure to demonstrate the

required scholarship) which, if authentic, was nondiscriminatory and sufficient to ground the tenure denial. Plaintiff then ascended to the framework's next stage, endeavoring to show that defendants' professed reason was a pretext for discrimination.

Given this posture, the proper focus of appellate inquiry must be the district court's ultimate finding of discrimination *vel non*. *See Dance* v. *Ripley*, 776 F.2d 370, 373 (1st Cir. 1985); *Johnson*, 731 F.2d at 70. And in that regard,

> reviewing courts should [not] treat discrimination differently from other ultimate questions of fact. Nor should they make their inquiry even more difficult by applying legal rules which were devised to govern 'the basic allocation of burdens and order of proof' in deciding this ultimate question.

United States Postal Serv. Bd. of Govs. v. *Aikens*, 460 U.S. 711, 716, 103 S.Ct. 1478, 1482, 75 L.Ed.2d 403 (1983) (quoting *Burdine*, 450 U.S. at 252, 101 S.Ct. at 1093).

Stripped of legalistic jargon, appellant's principal contentions rest squarely on this ultimate question. Her core claim reduces to the assertion that, had the facts been judged properly, she would have prevailed. In the Rule 52 milieu, this is a high hurdle to vault, especially since articulation of defendants' reasons dissipated the evidentiary force of the original presumption. *See Burdine*, 450 U.S. at 255, 101 S.Ct. at 1094; *Keyes*, 853 F.2d at 1023. The task of showing clear error is daunting—more so, perhaps, in a case like this, since courts must be mindful of the essentially subjective nature of tenure decisions and, therefore, "must take special care to preserve the University's autonomy in making lawful tenure decisions." *Brown* v. *Trustees of Boston Univ.*, 891 F.2d 337, 346 (1st Cir. 1989).

Appellant attempts to avoid the looming problem by claiming that the *Burdine* framework was inapplicable and that the buden of proof should have been allocated more favorably to her. But upon close perscrutation, this contention seems no more than an unfounded effort "to wriggle out from beneath Rule 52(a) by claiming that the district court mistook the law." *Reliance Steel*, 880 F.2d at 577.

[3] If a plaintiff can provide direct evidence that gender bias infected the decisionmaking process, the *Burdine* framework becomes irrelevant and the burden shifts to defendant to prove that the same decision would have ensued in the absence of the alleged discrimination. *See Price Waterhouse* v. *Hopkins*, __ U.S. __, 109 S.Ct. 1775, 1787-88, 104 L.Ed.2d 268 (1989) (plurality op.); *Fields* v. *Clark Univ.*, 817 F.2d 931, 935-37 (1st Cir. 1987). Jackson says her case qualifies under this rubric by reason of two key evidentiary items: (1) McArthur told her that "if [the government or the public] wanted women on the [Business School] faculty in larger numbers, they would have to impose quotas because otherwise Harvard would go through the affirmative action procedures but would not actually promote women;" and (2) she was treated differently from male applicants in that Bradley was allowed to serve as a member of the 1981 subcommittee over Jackson's objection.

[4, 5] Plaintiff's glass is half full. The district court, to be sure, found it "likely" that McArthur "made some version of the [attributed] statement." 721 F.Supp. at 1433. The court also found that Jackson had suffered disparate treatment in respect to Bradley's inclusion on the screening panel. *Id.* at 1434. Nonetheless, the glass is also half empty: calling the evidence "direct" does not make it so, but merely camouflages the terrain. Seen in context, appellant has done no more than dress two factual disputes in rather ill-fitting "legal" costumery. She does not profit by such a masquerade. *See Reliance Steel*, 880 F.2d at 577. What appellant's analysis

conveniently overlooks is that the inference sought to be drawn from her evidence — that gender bias skewed the decisionmaking process — is precisely a question of fact, and one which the district court resolved contrary to the interpretation urged by appellant. We explain briefly.

Direct evidence is evidence which, in and of itself, shows a discriminatory animus. Here, the district court, citing both McArthur's testimony that he he'd strong beliefs otherwise and the Business School's widely-admired affirmative action program, found Jackson's construction of McArthur's comment "strained." 721 F.Supp. at 1433. The court also found that "whatever caused Dean McArthur to reject [Jackson's] request to exclude Professor Bradley from [Jackson's] subcommittee, *it was not gender bias.*" *Id.* at 1434 (emphasis supplied). Moreover, Bradley's participation "played at most a *de minimis* role in the ultimate decision not to offer plaintiff tenure in 1981." *Id.* The court based its conclusions concerning the subcommittee's composition on a medley of considerations, including the absence of any persuasive evidence that Bradley was prejudiced against women; his vote to recommend tenure despite his personal reservations about appellant's scholarship; and the court's finding that the faculty's doubts anent scholarship, not Bradley's vote, caused the 1981 tenure denial. Plaintiff's "direct evidence" construct thus collapses of its own weight.

The remainder of Jackson's merits-related asseverations, howsoever ingeniously couched, implicate the weight of the evidence, not its sufficiency or the legal infrastructure on which the decision rests. Her remonstrances are uniformly unavailing. The trial judge correctly understood and applied the substantive and procedural rules for probing sex discrimination in the context of academic tenure disputes. *See* 721 F.Supp. at 1401-04. The court's recension of the evidence and its selection of inferences, albeit not inevitable, has the ring of utter plausibility. While a different set of inferences could supportably have been drawn, it is not our province to second-guess the trial court's "election among conflicting facts or its

choice of which competing inferences to draw. . . ." *Irons* v. *FBI*, 811 F.2d at 684. Nor does counsel's eloquent presentation of Jackson's case carry the day: "the mere repetition of arguments, in strong language and with evident feeling, is insufficient to the task [of overbearing Rule 52(a)]." *Reliance Steel*, 880 F.2d at 577.

In this instance, a painstaking canvass of the record intimates no hint of clear error. Because we are not "left with the definite and firm conviction that a mistake has been committed," *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 395, 68 S.Ct. 525, 542, 92 L.Ed. 746 (1948), we must leave the trial court's findings and conclusions undisturbed.[2]

IV. DISCOVERY IRREGULARITIES

Appellant's next assignment of error implicates the district court's handling of certain discovery irregularities. There are two prominent bones of contention: (1) when appellant attempted to obtain access to the files of certain successful (male) tenure candidates, she found that they had been destroyed in contravention of the University's rules on document retention

[2] Appellant complains that the district court erred by stating that "whether or not [Jackson] . . . is more qualified than tenured males . . . is irrelevant in this Title VII action." 721 F.Supp. at 1443. Although we question the court's choice of terminology, we disagree with appellant's characterization of the comment. Taken in context, the court's statement was an unmistakable reference to a settled principle: courts do not decide whether candidates' tenure qualifications were judged incorrectly, but only whether the ultimate decision was based on an unlawful factor. *See Sweeney* v. *Bd. of Trustees of Keene State College*, 604 F.2d 106, 112 (1st Cir. 1979), *cert. denied*, 444 U.S. 1045, 100 S.Ct. 733, 62 L.Ed.2d 731 (1980); *see also Keyes*, 853 F.2d at 1026 (even if plaintiff's qualifications were superior to those of successful male, that would not prove her case; an employer's mere "[e]rrors in judgment are not the stuff of Title VII transgressions"). Comparisons may, of course, have evidentiary value in Title VII litigation, *see, e.g.*, *Brown* v. *Trustees of Boston Univ.*, 891 F.2d at 347-48 (discussing admissibility of docent-to-docent comparisons in tenure denial case), but other parts of the district court's opinion render it pellucid that the judge understood the real relevance of comparisons between Jackson's treatment and the treatment accorded male candidates. *See, e.g.*, 721 F.Supp. at 1438.

and storage; (2) although appellant sought production of the 1981 faculty vote tallies early on, defendants did not deliver them until the trial was nearly over, having initially represented that the records did not exist. Jackson argues that the trial court erred in finding defendants' conduct merely negligent and in imposing insufficiently exacting remedies.

We examine Jackson's complaints anent discovery in the ensemble. As to the appraisal of the University's cumulative conduct as negligent, 721 F.Supp. at 1404-05, we find adequate support for the district court's analysis. While the record is not unarguable as to defendants' intent and degree of culpability, ambiguity and alternative inference are for trial courts to sift. Since the finding of negligence is one of fact and falls within the range of plausibility, we cannot alter it. *See Anderson* v. *City of Bessemer City*, 470 U.S. at 573-74, 105 S.Ct. at 1511-12.

Plaintiff's follow-on point is that, with Harvard's misconduct revealed, the district court should have acted more decisively under Fed.R.Civ.P. 26(g), 37(b), and 37(d) (collectively, empowering the court to levy sanctions for various kinds of discovery lapses). Jackson requested the judge to draw a negative inference about the content of the destroyed files and to preclude defendants from putting the faculty votes into evidence. The judge demurred, instead reopening the evidence and offering plaintiff a continuance, relaxation of an earlier privilege restriction, and the right to engage in further discovery. The court eschewed the imposition of more onerous sanctions, being "unwilling to decide this case on the basis of evidentiary constructs such as adverse inferences and preclusionary orders." *Id.* at 1405.

We review a choice of sanctions only for abuse of discretion. *National Hockey League* v. *Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 642, 96 S.Ct. 2778, 2780, 49 L.Ed.2d 747 (1976) (per curiam); *Anderson* v. *Beatrice Foods Co.*, 900 F.2d at 393; *Fashion House, Inc.* v. *K mart Corp.*, 892 F.2d 1076, 1081 (1st Cir. 1990). A district court's discretion to fashion dis-

covery orders and remedies for misconduct is broad. *See In re San Juan Dupont Plaza Hotel Fire Litigation*, 859 F.2d 1007, 1019 (1st Cir. 1988) (discovery orders); *Anderson* v. *Cryovac, Inc.*, 862 F.2d 910, 923 (1st Cir. 1988) (discovery misconduct). The same breadth applies to a district court's decision to impose sanctions less severe than the outermost limits of discretion would allow, or, within the purview of Rule 37 at least, not to impose sanctions at all. *See Benitez-Allende* v. *Alcan Aluminio do Brasil, S.A.*, 857 F.2d 26, 33 (1st Cir. 1988), *cert. denied*, ____ U.S. ____, 109 S.Ct. 1135, 103 L.Ed.2d 196 (1989); *Craig* v. *Far West Eng'g. Co.*, 265 F.2d 251, 260 (9th Cir.), *cert. denied*, 361 U.S. 816, 80 S.Ct. 57, 4 L.Ed.2d 63 (1959); *cf. Unanue-Casal* v. *Unanue-Casal*, 898 F.2d 839, 841 (1st Cir. 1990) (Rule 11 sanctions "legally required" in some cases). Whether harsher sanctions were the best solution or whether we, if making a fresh diagnosis, might have prescribed some stronger medicine, are not determinative considerations. *See Marquis Theatre Corp.* v. *Condado Mini Cinema*, 846 F.2d 86, 90 (1st Cir. 1988). Rather, appellate inquiry is limited to whether the trial court's chosen course of action came "safely within the universe of suitable" alternatives. *See Fashion House*, 892 F.2d at 1082.

In *Fashion House*, we observed that:

> Abuse [of discretion] occurs when a material factor deserving significant weight is ignored, when an improper factor is relied upon, or when all proper and no improper factors are assessed, but the court makes a serious mistake in weighing them.

Id. at 1081. (quoting *Independent Oil and Chemical Workers of Quincy, Inc.* v. *Procter & Gamble Mfg. Co.*, 864 F.2d 927, 929 (1st Cir. 1988)). We find no abuse here. The considerations relied on by the district judge were relevant. Although Jackson disparages the court's findings and the manner in which they were weighted, she identifies nothing consequen-

tial which the court overlooked. By the same token, she points to nothing improper which the court examined. And the balance struck does not jar our sensibilities.

On this record, it was permissible for the court to conclude that the tardy production of records and the loss of evidence did not flow from defendants' consciousness that the documents would hurt their case. Once that finding was made, the court was entitled to treat it as an important part of the calculus of relief. *See Nation-Wide Check Corp.* v. *Forest Hills Distributors*, 692 F.2d 214, 219 (1st Cir. 1982); *Allen Pen Co.* v. *Springfield Photo Mount Co.*, 653 F.2d 17, 23-24 (1st Cir. 1981). After all, where misconduct is not willful or intentional, "there seems less reason for an adverse presumption." *Anderson* v. *Cryovac Inc.*, 862 F.2d at 926. Preclusion and negative inference are grave steps, "by no means an automatic response to a delayed disclosure . . . [or] where failure to make discovery [is] not willful." *Freeman* v. *Package Machinery Co.*, 865 F.2d 1331, 1341 (1st Cir. 1988).

In this situation, we think it was reasonable for the judge to conclude that "the sanction needed to be one appropriate to the truth-finding process, not one that . . . served only further to suppress evidence." 721 F.Supp. at 1414. The remedy devised — a continuance and an open run at further discovery — was a concinnous response to the problems created by the University's negligence. There is simply no principled way in which we can conclude that the trial court misused its broad discretion.

V. CONCLUSION

To recapitulate, the district court's finding that the tenure denial was not a result of discriminatory animus on Harvard's part was not clearly wrong. Nor did the court overstep its broad discretionary powers in dealing with irregularities occurring in the course of pretrial discovery. Indeed, the record establishes, beyond serious question, that appellant re-

ceived all the process that was due. Her most compelling complaint seems simply that, believing herself to be in the right, she nevertheless lost her case. Her dissatisfaction is understandable. But the University, on the evidence adduced at trial, had an equal claim to believe that it had struck no foul blows. Resolving which of the two disputants was entitled to prevail under applicable law in a close, fact-dominated case is precisely the sort of grist for which the trial mill was long ago devised.

Affirmed.

UNITED STATES DISTRICT COURT
D. MASSACHUSETTS

Civ. A. No. 84-4101-WD.

BARBARA JACKSON,
PLAINTIFF,

v.

HARVARD UNIVERSITY AND JOHN H. McARTHUR,
DEFENDANTS.

AUG. 14, 1989

Female faculty member brought action against university and university officials after she was denied tenure. The District Court, Woodlock, J., held that evidence was insufficient to establish that plaintiff was denied tenure because of her sex.

Judgment accordingly.

Evan T. Lawson, Lawson & Wayne, Boston, Mass. for plaintiff.
Allan A. Ryan, Jr., Office of the Gen. Counsel, Cambridge, Marc Goodheart, Hill & Barlow, Boston, Mass., for defendants.

MEMORANDUM

WOODLOCK, District Judge.

Barbara Jackson brings this sex discrimination case pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*, against Harvard University and John H. McArthur, Dean of the University's Graduate School of Business Administration (the "Business School"). Ms. Jackson was denied tenure

in the Marketing Area at the Business School in 1983. She alleges that the process by which she was denied tenure was tainted with sexual discrimination.

The case was tried without a jury over an eight-day period, and the evidence was thereafter reopened to receive documents belatedly produced by defendants. For the reasons presented below, I find the evidence fails to establish discrimination against Ms. Jackson on account of her gender. Accordingly, judgment will enter for the defendants.

This memorandum sets forth the findings of fact and conclusions of law required for resolution of this nonjury matter. *See* Fed.R.Civ.P. 52(a).

Before turning to a detailed presentation of the findings and conclusions, however, it will be useful to provide as an overview a concise statement of my determinations in this case.

I. OVERVIEW

[1] This case concerns a faculty tenure decision upon which reasonable people could and did disagree. The plaintiff Jackson, although a talented academic, failed on two occasions to convince a critical mass of the tenured faculty at the Business School that she should herself be admitted to tenured status. Lacking that critical mass of support, Ms. Jackson's candidacy did not receive the necessary support of the defendant Dean McArthur.

The evidence presented satisfies me that the judgment not to recommend Ms. Jackson for tenure was not infected by considerations of gender in any way. It was instead a determination on the merits as to which a large number of people of good will differed without reference to improper considerations. There was no direct evidence of discrimination presented; indeed, none of Ms. Jackson's supporters for tenure — numbering slightly over half the tenured faculty who participated at the critical meetings — came forward to testify that gender considerations played any role in the rejection of their position.

Nor does any of the circumstantial evidence adduced by Ms. Jackson provide an alternative basis for finding a discriminatory cause in the denial of tenure.

Given the state of the evidence, the resolution of this case should have been relatively prompt and the determination clear in favor of the defendants. However, given the lack of assistance from the parties in producing relevant evidence, the judicial decision-making process was rendered time consuming and laborious. But at the conclusion of that process the proper outcome continues to be clear. Nothing in the lengthy evaluation given the record in this case has disclosed any reason to believe that Ms. Jackson's gender played a part in the decision of the defendant Harvard, acting through its agent Dean McArthur, to deny her tenure at the Business School.

The tenure process at the Business School makes Dean McArthur the pivotal figure. His decision to recommend or not to recommend an individual for tenure to the President and governing bodies of Harvard is effectively dispositive. But the Dean's decision itself turns upon whether a substantial majority of the tenured faculty favor tenure for the individual under consideration. In the case of Ms. Jackson, there was no substantial majority for tenure; rather, the faculty was about evenly split on the question when it was presented to them for a final vote, first in 1981, and again in 1983.

The tenure process for Ms. Jackson followed the traditional pathway in 1981. A Subcommittee, formed to review her work, generated a detailed report and made its own recommendation. By a 3-1 vote the Subcommittee found Ms. Jackson met the standards for tenure. The one dissenter took the position that while she did not meet the standards she should nevertheless be granted tenure as an exceptional case.

The tenure question was then taken up by the tenured faculty as a whole. Following customary practice, a preliminary vote was taken after a preliminary discussion of Ms. Jackson's qualifications, and she received a substantial majority in support of tenure. However, when the final vote was taken less

than a month later, Ms. Jackson's substantial majority had evaporated and only a slight majority continued to support her tenure candidacy. Although obviously relevant, this rapid evaporation of support was not the topic of any evidence adduced by the parties at trial.

Faced with only this slight majority of support for Ms. Jackson after the 1981 tenure votes, Dean McArthur chose a somewhat unusual approach. Rather than employing the customary one-year termination appointment ordinarily extended tenure candidates who fail to obtain substantial faculty support, the Dean organized a series of meetings designed to fashion a strategy to meet the perceived deficiency in the record Ms. Jackson presented: her lack of sufficient creativity. During the spring of 1982 interested members of the faculty met with her to define a project which would satisfy those who had opposed her tenure candidacy.

Such a project was developed that spring. And despite reservations about the definition given it, Ms. Jackson — who was relieved of any classroom responsibilities to allow her to devote full time to the project — began her work. Dean McArthur made clear that the project did not need to be completed before the end of February 1984. He further indicated that the final deadline could be extended to the late summer or fall of 1984. Nevertheless, Ms. Jackson decided to complete the project as quickly as possible. She submitted a draft to certain tenured professors in her Area over the summer of 1983. In memoranda delivered in early August, two of the reviewers criticized this draft severely because of its superficiality. Heedless of these harbingers that her performance on the project was not meeting with support from interested representatives of the group whose substantial support she would need to achieve tenure, Ms. Jackson submitted her final version at the end of August 1983, within a month after receiving the severely negative comments and well before any deadline for submission.

Predictably, Ms. Jackson's rush to judgment in the face of adverse comments did not improve her tenure chances. The

1983 Subcommittee recommended unanimously against tenure for Ms. Jackson and the full tenured faculty voted in favor of tenure for her by only a modest majority, well short of the substantial majority Dean McArthur considered necessary before he would recommend tenure. At this point, Dean McArthur offered the termination appointment; Ms. Jackson left the Business School and this litigation ensued.

On their face, nothing in these proceedings fairly suggests Ms. Jackson was discriminated against on the basis of her sex in the Business School's tenure decision. I have found nothing in the direct evidence concerning that process to support such a claim. Ms. Jackson, however, has also raised a collection of circumstantial matters which she maintains support her contention. Broadly stated, these circumstantial matters relate to the environment at the Business School, purported irregularities in its procedures as applied to Ms. Jackson's candidacy, and alleged disparate treatment of male tenure candidates. I have analyzed these matters in great detail and find nothing beneath the surface which supports Ms. Jackson's position. The circumstantial matters reduce to a collection of attenuated, dated, and immaterial incidents and stray remarks, *de minimus* procedural anomalies, and inapposite comparisons with other tenure candidates.

Viewing the appropriate judgment as extraordinarily clear, I was prepared to decide this case from the bench adversely to the plaintiff with an *ore tenus* decision dictated into the record. During the course of trial it also became clear, however, that the defendants, in addition to a very strong case, were benefitting improperly from their own discovery misconduct and the operation of certain misconceived pre-trial discovery rulings. Prior to trial the defendants destroyed documents they were under a court order to produce. They also availed themselves of a spurious privilege not to disclose the particulars of tenure discussions and evaluations. When it developed that the defendants had in addition not responded fully to pre-trial document demands, I offered the plaintiff *sua sponte* the

opportunity to conduct further discovery to counteract these evidentiary limitations. She rejected this opportunity to adduce additional relevant evidence and pressed only for sanctions which would relieve her of the burden of proving her case by the introduction of evidence. The imposition of such sanctions, however, was unacceptable to me as a means of resolving factual disputes.

In deciding this case I found an absence of evidence which the parties should have adduced but for various reasons neither proposed to offer nor ultimately even sought to discover. Concerned that the defendants not benefit unfairly by their own misconduct and what I came to conclude were erroneous pre-trial privilege determinations, I found it necessary to read and reread the documentary submissions and trial testimony to assure myself that I had accounted for all the links — even those missing from the evidence offered by the parties — in the chains which bind this case together. After undertaking this extensive review, I am satisfied that my initial tentative judgment was correct.

In summary, there is in this case no basis on which to find gender discrimination against the plaintiff in her tenure review. It is simply a case presenting the supportable conclusion of a university and its responsible Dean that a member of a protected class — Ms. Jackson, a qualified female tenure candidate — did not satisfy the necessarily subjective standards which guide tenure determinations. There is here insufficient — indeed virtually no — evidence that illicit discriminatory motives were at work. Thus, I am not free to interpose whatever independent views I might harbor regarding the merits of Ms. Jackson's tenure candidacy but must enter judgment for the defendants.

II. LEGAL PRINCIPLES

In the taxonomy of Title VII, this action is an "individual disparate treatment" case. The Supreme Court has explained

the "basic allocation of burdens and order of presentation of proof" in such cases as a three-step process:

> First, the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant "to articulate some legitimate, nondiscriminatory reason for the employee's rejection." Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.

Texas Dep't of Community Affairs v. *Burdine*, 450 U.S. 248, 252-53, 101 S.Ct. 1089, 1093, 67 L.Ed.2d 207 (1981) (citations omitted) (quoting *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802, 93 S.Ct. 1817, 1824, 36 L.Ed.2d 668 (1973)); *see also Fields* v. *Clark Univ.*, 817 F.2d 931, 934 (1st Cir. 1987).

To prove a prima facie Title VII case for discriminatory denial of tenure, a woman in the position of Ms. Jackson must show

(a) that as a candidate for tenure she was qualified under Business School standards, practices, or customs;[1]

(b) that despite her qualifications she was rejected; and

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[1] With respect to this element, the plaintiff "'need only show that [she] was sufficiently qualified to be among those persons from whom a selection, to some extent discretionary, would be made. That is, [she] need show only that [her] qualifications were at least sufficient to place [her] in the middle group of tenure candidates as to whom both a decision granting tenure and a decision denying tenure could be justified as a reasonable exercise of discretion by the tenure-decision making body'." *Banerjee* v. *Board of Trustees*, 648 F.2d 61, 62-63 (1st Cir.), *cert. denied*, 454 U.S. 1098, 102 S.Ct. 671, 70 L.Ed.2d 639 (1981) (quoting opinion below, 495 F.Supp. 1148, 1155-56 (D.Mass. 1980)); *see also Fields*, 817 F.2d at 934.

(c) that tenure positions in the Marketing Area at the Business School were open at the time she was denied tenure, in the sense that others were granted tenure in the Area during a period relatively near to the time she was denied tenure.

See Banerjee v. *Board of Trustees*, 648 F.2d 61, 62-63 (1st Cir.), *cert. denied*, 454 U.S. 1098, 102 S.Ct. 671, 70 L.Ed.2d 639 (1981).

[2] If the plaintiff succeeds in making out her prima facie case, the burden of production then shifts to the defendant "to articulate some legitimate, nondiscriminatory reason" for the decision to deny tenure to the plaintiff. *McDonnell Douglas*, 411 U.S. at 802, 93 S.Ct. at 1824; *see also Banerjee*, 648 F.2d at 63. The defendant needs only "to *articulate*, not prove, a non-discriminatory reason for its action." *Menard* v. *First Sec. Servs. Corp.*, 848 F.2d 281, 285 (1st Cir. 1988) (emphasis in original); *accord Oliver* v. *Digital Equip. Corp.*, 846 F.2d 103, 108 (1st Cir. 1988); *see Board of Trustees* v. *Sweeney*, 439 U.S. 24, 99 S.Ct. 295, 58 L.Ed.2d 216 (1978) (per curiam).

[3] Finally, if the defendant successfully comes forward with a nondiscriminatory reason for the tenure denial, the burden shifts back to the plaintiff to show that the articulated nondiscriminatory reason was a pretext for sex discrimination. *Burdine*, 450 U.S. at 253, 256, 101 S.Ct. at 1093, 1095. The plaintiff can establish pretext "directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." *Id.* at 256, 101 S.Ct. at 1095. However, a plaintiff

> cannot meet his burden of proving "pretext" simply by refuting or questioning the defendants' articulated reason.
>
> > Merely casting doubt on the employer's articulated reason does not suffice to meet the plaintiff's burden

> of demonstrating discriminatory intent, for "[t]he defendant need not persuade the court that it was actually motivated by the proffered reasons" in the first place. To hold otherwise would impose an almost impossible burden of proving "absence of discriminatory motive."

Dea v. *Look*, 810 F.2d 12, 15 (1st Cir. 1987) (citation omitted) (quoting *White* v. *Vathally*, 732 F.2d 1037, 1042-43 (1st Cir.), *cert. denied*, 469 U.S. 933, 105 S.Ct. 331, 83 L.Ed.2d 267 (1984) (quoting *Burdine*, 450 U.S. at 253-54, 101 S.Ct. at 1094)).[2]

[4] Under the conventional three-step *Burdine* framework outlined, "[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *Burdine*, 450 U.S. at 253, 101 S.Ct. at 1093. However, there is one type of Title VII case in which the conventional *Burdine* framework is modified, and in which the ultimate burden does shift to the defendant: in a "mixed motive" case, one in which the plaintiff is able to prove that the employer's decision was motivated in part by illegitimate factors, the employer can escape liability only "if it can prove that, even if it had not taken gender into account, it would have come to the same decision regarding a particular person." *Price Waterhouse* v. *Hopkins*, ____

[2] *Dea* involved the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621-634, originally passed in 1967, which largely tracks Title VII. Precedents interpreting the ADEA are, therefore, a helpful guide to the interpretation of Title VII. "[I]n cases brought under ... the [ADEA), ... courts borrow the Title VII order of proof for the conduct of jury trials." *Price Waterhouse* v. *Hopkins*, ____ U.S. ____, 109 S.Ct. 1775, 1812, 104 L.Ed.2d 268 (1989) (Kennedy, Jr., dissenting); *see Fields*, 817 F.2d at 934 n.1 ("[T]he *McDonnell Douglas* test is followed to the same extent under [the ADEA] as under [Title VII]."); *see also Trans World Airlines, Inc.* v. *Thurston*, 469 U.S. 111, 121, 105 S.Ct. 613, 621, 83 L.Ed.2d 523 (1985) (holding an interpretation of Title VII applicable "with equal force in the context of age discrimination, for the substantive provisions of the ADEA 'were derived *in haec verba* from Title VII'") (quoting *Lorillard* v. *Pons*, 434 U.S. 575, 584, 98 S.Ct. 866, 872, 55 L.Ed.2d 40 (1978)).

U.S. ____, 109 S.Ct. 1775, 1786, 104 L.Ed.2d 268 (1989) (Brennan, J., plurality opinion). A plaintiff can prove illegitimate motivation, and thus push her case into the *Price Waterhouse* framework, by offering "direct evidence" of discrimination. *See id.* 109 S.Ct. at 1801-06 (O'Connor, J., concurring); *Trans World Airlines, Inc.* v. *Thurston*, 469 U.S. 111, 121-22, 105 S.Ct. 613, 621-22, 83 L.Ed.2d 523 (1985); *Fields*, 817 F.2d at 935; *Johnson* v. *Allyn & Bacon, Inc.*, 731 F.2d 64, 69 n.6 (1st Cir.), *cert. denied*, 469 U.S. 1018, 105 S.Ct. 433, 83 L.Ed.2d 359 (1984).[3]

Of course, as the First Circuit has recognized,

> [i]n a discriminatory discharge case, it is likely that a plaintiff could seldom uncover direct proof that his employer fired him solely for [an impermissible reason]. . . . [A] plaintiff in a case like this will rarely, if ever, be able to produce a "smoking gun" that provides direct, subjective evidence of an employer's [discriminatory] intent.

Stepanischen v. *Merchants Despatch Transp. Corp.*, 722 F.2d 922, 929 (1st Cir. 1983) (discussing the Railway Labor Act, 45 U.S.C. § 152 Fourth); *accord Hallquist* v. *Local 276, Plumbers and Pipefitters Union*, 843 F.2d 18, 24 (1st Cir. 1988) ("[W]e have always recognized that 'direct' evidence of discrimination is elusive in Title VII cases."). "Particularly in

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[3] For examples of items that courts have regarded as "direct evidence" of discriminatory intent, see *Fields*, 817 F.2d at 933, 935 (statement to plaintiff by associate professor that rejecting his advances "'was no way to get tenure'"); *Thurston*, 469 U.S. at 121, 105 S.Ct. at 621-22 (age-based transfer policy); *Blalock* v. *Metal Trades, Inc.*, 775 F.2d 703, 707-09 (6th Cir. 1985) (acknowledgement by agent of defendant that plaintiff's religion played a role in his discharge); *Miles* v. *M.N.C. Corp.*, 750 F.2d 867, 873-74 (11th Cir. 1985) (statement by person in charge of hiring for defendant that he did not hire blacks because "'[h]alf of them weren't worth a shit'"); *Bell* v. *Birmingham Linen Serv.*, 715 F.2d 1552, 1553-57 (11th Cir. 1983), *cert. denied*, 467 U.S. 1204, 104 S.Ct. 2385, 81 L.Ed.2d 344 (1984) ("sexist statement" by selecting supervisor "that he would not put [plaintiff] in the washroom because if he did, 'every woman in the plant would want to go into the washroom'").

a college or university setting, where the level of sophistication is likely to be much higher than in other employment situations, direct evidence of sex discrimination will rarely be available." *Sweeney* v. *Board of Trustees*, 569 F.2d 169, 175 (1st Cir.), *vacated on other grounds*, 439 U.S. 24, 99 S.Ct. 295, 58 L.Ed.2d 216 (1978) (per curiam).

[5] Another implication of this higher level of sophistication is that when the plaintiff's quondam employer is an academic institution, assessment of the proof of causation is an undertaking of considerable subtlety. The assessment therefore requires special sensitivity to the limits of the Title VII court's writ:

> [T]he district court ... is [not] empowered to sit as a super tenure board. ... [C]ourts must be extremely wary of intruding into the world of university tenure decisions. These decisions necessarily hinge on subjective judgments regarding the applicant's academic excellence, teaching ability, creativity, contributions to the university community, rapport with students and colleagues, and other factors that are not susceptible of quantitative measurement. Absent discrimination, a university must be given a free hand in making such tenure decisions. Where ... the university's judgment is supportable and the evidence of discrimination negligible, a federal court should not substitute its judgment for that of the university. ...
>
> ....
>
> ... Inevitably, some tenure decisions ... will be very close — may, indeed, split the university community and lead responsible people to very different conclusions on the merits. Courts have no license to resolve such disputes except where there is evidence from which to conclude that an illicit motive was at work. The fact that a court might be sympathetic to a tenure award is not enough from which to find discrimination unless the University's stated reasons are palpably unworthy of credence or there is other evidence pointing to discrimination.

Kumar v. *Board of Trustees*, 774 F.2d 1, 12 (1st Cir. 1985) (Campbell, C.J., concurring), *cert. denied*, 475 U.S. 1097, 106 S.Ct. 1496, 89 L.Ed.2d 896 (1986). Thus, it was error to have "treated Title VII of the Civil Rights Act of 1964 as though it were an affirmative action statute, and so proceeded on the theory that once a candidate was 'qualified' under the standards of the university, it would be pretextual for the university's administrator not to appoint him." *Id.* at 10-11 (Wyzanski, D.J.).

Indeed, courts must recognize

> the importance of allowing universities to run their own affairs (and to make their own mistakes). To do otherwise threatens the diversity of thought, speech, teaching, and research both within and among universities upon which free academic life depends. *Cf. Board of Curators* v. *Horowitz*, 435 U.S. 78, 87-91 [, 98 S.Ct. 948, 953-56, 55 L.Ed.2d 124] (1978) (counseling discretion in judicial interference in academic decisionmaking).

Vargas-Figueroa v. *Saldana*, 826 F.2d 160, 162-163 (1st Cir. 1987). A tenure decision of a college or university "is entitled to stand even if it appears to have been misguided, unless it was sex biased [or based on other prohibited motives]." *Sweeney* v. *Board of Trustees*, 604 F.2d 106, 112 (1st Cir. 1979), *cert. denied*, 444 U.S. 1045, 100 S.Ct. 733, 62 L.Ed.2d 731 (1980).

[6, 7] Finally, more subjectivity is permitted with respect to academic tenure decisions than might be tolerated in other Title VII settings. This is because of

> the difference between the selection of a craftsman and of a professional. A bricklayer who can properly lay a specified number of bricks in a specified period is ordinarily as good as any other bricklayer likely to appear. But in the selection of a professor, . . . while there may be appro-

> priate minimum standards, the selector has a right to seek distinction beyond the minimum indispensable qualities.

Kumar, 774 F.2d at 11 (Wyzanski, D.J.). In short, the elasticity of promotion standards for teachers in an academic setting does not constitute, in and of itself, evidence of discrimination. *Cf. Watson* v. *Fort Worth Bank and Trust*, ____ U.S. ____, 108 S.Ct. 2777, 2791, 101 L.Ed.2d 827 (1988) (plurality opinion) ("'[The] criteria [used by a university to award tenure], however difficult to apply and however much disagreement they generate in particular cases, are job related. . . . It would be a most radical interpretation of Title VII for a court to enjoin use of an historically settled process and plainly relevant criteria largely because they lead to decisions which are difficult for a court to review'.") (quoting *Zahorik* v. *Cornell Univ.*, 729 F.2d 85, 96 (2d Cir. 1984)).

III. MISSING EVIDENCE

Given the great subtlety and sensitivity required in assessing the evidence in this action, I am compelled to begin the detailed findings and conclusions by evaluating in depth the lack of certain evidence which might have been relevant and material to a determination of this case. Full development of the record has been hampered by what I shall call the problem of missing evidence, caused jointly and severally by the application of what I have now concluded was an erroneous extension of evidentiary privilege to the defendants, by the negligence of the defendants in preserving documents, by the inattentiveness of the defendants to their discovery responsibilities, and, ultimately, by the strategic judgment of the plaintiff herself not to pursue further discovery when it was offered her by the court.

The plaintiff sought to short circuit the judgment process and obtain the benefit of certain adverse inferences and preclusionary orders as a result of the missing evidence. She was,

however, unwilling to accept an offer to conduct further discovery in order to remedy the advantage that she contended defendants had previously obtained improperly from the privilege, the documentary destruction, and the discovery defaults. For my part, I have been unwilling to decide this case on the basis of evidentiary constructs such as adverse inferences and preclusionary orders.

In this section, I make findings and draw conclusions regarding the various aspects of the problem of missing evidence. I first consider the limitations created for plaintiff in her development of proof and then address the remedies for those limitations.

A. *The Evidentiary Limitations*

1. The Erroneous Privilege

[8] This case was assigned to me when I joined the court. A certain amount of discovery had been conducted, and Magistrate Cohen and Judge Garrity, to whom the case was previously assigned, had made a number of legal determinations. One of these determinations resulted in the recognition of a "qualified academic privilege against disclosure" of the identities of faculty and peer reviewers who furnished evaluations to the Business School in the tenure review process. *Jackson* v. *Harvard Univ.*, 111 F.R.D. 472, 474 (D.Mass. 1986).

In keeping with my practice of continuing to apply the law previously applied by other judicial officers in those ongoing cases for which I assumed responsibility — and despite significant reservations — I attempted to apply the privilege to discovery and trial of this case. In the course of discovery, however, the strictures of the privilege were modified somewhat.

For example, I concluded that the privilege was jointly held both by each individual reviewer and by Harvard as the academic institution. Thus, if deposed or called to testify, an individual reviewer was free to choose to disclose his or her own

views as communicated in the review process. The reviewer was not free, absent Harvard's assent, to identify the individual views of others. Further, the parties were permitted to inquire into the range of expressed views — without identifying by name the reviewers or commentators — through protocols for distinguishing among reviewers and commentators by the use of letters, e.g., Reviewer A and Committee Member D, rather than specific names.[4]

In fashioning a privilege for evaluators in the tenure process, Judge Garrity relied upon *EEOC* v. *University of Notre Dame du Lac*, 715 F.2d 331 (7th Cir. 1983), in which the Seventh Circuit held that universities may redact any "identifying features" of peer reviewers before turning files over. *Id.* at 337-38. Under *Notre Dame du Lac*, in order to obtain more information, a plaintiff must

> make a substantial showing of "particularized need" for relevant information, a burden similar to that imposed on a party seeking disclosure of grand jury materials.
>
> . . . [T]he mere fact that certain information may be relevant or useful does not establish a "particularized need" for disclosure of information. The party seeking disclosure of the privileged information must show a "compelling necessity" for the *specific* information requested.

Id. at 338 (emphasis in original) (citations omitted). Academic privilege is needed, in the Seventh Circuit's view, because

> confidentiality is absolutely essential to the proper functioning of the faculty tenure review process. The tenure

[4] The specific names of tenure candidates other than Ms. Jackson were similarly protected. Thus other tenure candidates were identified by year of tenure consideration and by a number; e.g., Candidate 81-1 would be one of several candidates considered in 1981. The named identities of the tenure candidates were masked in this fashion not as a result of privilege considerations but rather in an effort to minimize intrusions upon their privacy.

> review process requires that written and oral evaluations submitted by academicians be completely candid, critical, objective and thorough. . . . Without [the] assurance of confidentiality, academicians will be reluctant to offer candid and frank evaluations in the future.

Id. at 336.

A number of other courts have not gone so far as to establish a rule of academic privilege, but have fashioned instead a balancing approach. In *Keyes* v. *Lenoir Rhyne College*, 552 F.2d 579 (4th Cir.), *cert. denied*, 434 U.S. 904, 98 S.Ct. 300, 54 L.Ed.2d 190 (1977), the Fourth Circuit upheld, as an appropriate exercise of discretion under Fed.R.Civ.P. 26(c), a lower court's refusal — based on a balancing of the interest of the college in confidentiality against the need of the plaintiff for the material — to order disclosure of confidential evaluations of faculty members. *Id.* at 581.

Without reference to Rule 26, the Second Circuit employed a similar balancing approach before allowing discovery of how members of a tenure committee voted. *Gray* v. *Board of Higher Educ.*, 692 F.2d 901 (2d Cir. 1982). The Second Circuit noted that the dangers of compelling disclosure are that "candid peer evaluation will be chilled, the harmony of faculty relations will be disturbed, and academic freedom will be threatened by government intrusion into the life of colleges and universities." *Id.* at 907. However, because the plaintiff was not given a "'meaningful written statement of reasons'" for his rejection, *id.* (quoting brief of American Association of University Professors), "the balance tips toward discovery and away from recognition of privilege," *id.* at 908. District courts in the Ninth Circuit have followed these precedents, *see, e.g.*, *Rubin* v. *Regents of Univ. of Cal.*, 114 F.R.D. 1, 2-4 (N.D. Cal. 1986), as has one in the Sixth Circuit, *see Parvarandeh* v. *Goins*, 124 F.R.D. 169, 170-73 (Mag. E.D.Tenn. 1988), *aff'd*, 124 F.R.D. 173 (E.D.Tenn. 1989). *But see Wright* v. *Jeep Corp.*, 547 F.Supp. 871, 875 (E.D.Mich. 1982) (refusing to

recognize academic privilege asserted by professor fighting subpoena of research notes by defendant in tort litigation).

Two circuits have ruled that tenure discussions, votes, and files are in no way privileged and hence fully discoverable. In *In re Dinnan*, 661 F.2d 426 (5th Cir. Unit B 1981), *cert. denied*, 457 U.S. 1106, 102 S.Ct. 2904, 73 L.Ed.2d 1314 (1982), the court rejected arguments that the privilege was necessary to protect the societal interests of academic freedom and the secret ballot, finding "neither argument to be even slightly persuasive." *Id.* at 430. The Third Circuit, in *EEOC* v. *Franklin and Marshall College*, 775 F.2d 110 (3d Cir. 1985), *cert. denied*, 476 U.S. 1163, 106 S.Ct. 2288, 90 L.Ed. 2d 729 (1986), was more sympathetic to the arguments in favor of the privilege, but nonetheless rejected them:

> A privilege or Second Circuit balancing approach which permits colleges and universities to avoid a thorough investigation would allow the institutions to hide evidence of discrimination behind a wall of secrecy.
>
> . . . In the face of the clear mandate from Congress which identified and recognized the threat of unchecked discrimination in education, . . . we have no choice but to trust that the honesty and integrity of the tenured reviewers in evaluating decisions will overcome feelings of discomfort and embarrassment and will outlast the demise of absolute confidentiality.

Id. at 115 (referring to Title VII). District courts in the Eighth Circuit have followed these precedents. *See Orbovich* v. *Macalester College*, 119 F.R.D. 411, 413-15 (Mag. D.Minn. 1988); *Rollins* v. *Farris*, 108 F.R.D. 714 (E.D.Ark. 1985).

I find the arguments against recognizing any form of academic privilege compelling. As a preliminary matter, the burden on the proponent of a new privilege is very high. In declining to create a new privilege for the President of the United States, the Supreme Court noted that "exceptions to

the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth." *United States* v. *Nixon*, 418 U.S. 683, 710, 94 S.Ct. 3090, 3108, 41 L.Ed.2d 1039 (1974) (footnote omitted). In a more domestic setting, the Court summed up its approach to privileges as follows:

> Testimonial exclusionary rules and privileges contravene the fundamental principle that "'the public . . . has a right to every man's evidence'." As such, they must be strictly construed and accepted "only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth."

Trammel v. *United States*, 445 U.S. 40, 50, 100 S.Ct. 906, 912, 63 L.Ed.2d 186 (1980) (citations omitted). Thus, academic privilege is defensible only if it serves some transcendent public good.

I am satisfied it does not. In fact, the opposite is true: when discrimination by an academic institution is alleged, the public good is best served by a thorough examination of the factors that influenced the disputed decision. If society perceives that a *teacher* has been the victim of discrimination, it can have no confidence that students will be allowed to succeed to the ultimate limits of their potential. The possibility that a qualified applicant will be rejected on other than academic grounds "is a much greater threat to our liberty and academic freedom than the compulsion of discovery." *Dinnan*, 661 F.2d at 431.

Moreover, it is difficult to see why a university should be entitled to a privilege to which other institutions are not. Presumably, candor and harmony are values desired by professional partnerships. Yet, if a law firm, *see Hishon* v. *King & Spalding*, 467 U.S. 69, 104 S.Ct. 2229, 81 L.Ed.2d 59 (1984), or an accounting firm, *see Price Waterhouse*, 109 S.Ct. 1775,

is charged with having refused to advance an individual on grounds that society has deemed impermissible, it is not permitted to shield from discovery the reasons for the decision or the identity of the assessors. Indeed, the importance of vindicating fair employment rights has been viewed as sufficient to overcome the traditional absolute immunity attaching to the decisions of judges made in the course of their work. *See Forrester* v. *White*, 484 U.S. 219, 108 S.Ct. 538, 98 L.Ed.2d 555 (1988). Why, then, should Harvard University be allowed to shield the identities of evaluators and the content of critical discussions which influence tenure and promotion decisions?

It is no answer that disclosure will chill frank evaluations of a teacher's merit. If anything, because members of tenure committees and peer reviewers themselves have tenure — or are otherwise substantial figures — they have less to fear from disclosure of their votes or evaluations than do those making employment decisions in other fields which have no claim to such a neo-privilege. In addition, the prospect of scrutiny can be expected to impress upon evaluators their duty to be prepared to offer defensible reasons for their judgments. A faculty member whose vote resulted from a reasoned assessment of an applicant's record, or a peer evaluator whose critique of a candidate's work is supported by scholarly analysis, has nothing to fear — except perhaps the disappointment of the subject and her supporters — from the disclosure of her vote or evaluation. It is only if improper considerations affected her decision that an evaluator need fear public scrutiny. That is a tolerable price to pay for any loss of faculty harmony. As Justice Brandeis observed in a different context, "Sunlight is said to be the best of disinfectants; electric light the most efficient policeman." L. Brandeis, *Other People's Money* 62 (Nat'l Home Lib. Found. ed. 1933).

Nor will academic freedom be imperiled by judicial refusal to recognize academic privilege. Academic freedom requires two conditions: that a university be free "'to determine for itself on academic grounds who may teach'," *Sweezy* v. *New*

Hampshire, 354 U.S. 234, 263, 77 S.Ct. 1203, 1218, 1 L.Ed.2d 1311 (1957) (citation omitted) (Frankfurter, J., concurring), and that there be no "governmental intervention in the intellectual life of a university," *id.* at 262, 77 S.Ct. at 1217-18. When a member of the university community alleges that the institution has violated the ground rules under which all employers must operate as employers, it is not inconsistent with principles of academic freedom for an impartial third party, the legal system, to settle the dispute — not by imposing selection criteria of its own, but by assessing whether the employment decision was made according to academia's own standards, free of impermissible nonacademic considerations.

The courts do not "reevaluate a candidate's qualifications," but rather leave tenure and promotion decisions "exclusively to this nation's colleges and universities so long as the decisions are not made, in part large or small, upon statutorily impermissible reasons." *Franklin and Marshall*, 775 F.2d at 117; *see also Rollins*, 108 F.R.D. at 719 ("Academic freedom in employment actions extends only insofar as legitimate, academic grounds form the basis of tenure decisions."). And only with access to all relevant information can a fact finder determine whether a university's decision in a particular case was based on academic considerations or discriminatory factors.

Finally, there is no reason why, upon a proper showing by the party opposing disclosure, confidential records cannot be produced subject to appropriate protective orders, forbidding further disclosure and permitting their use only by the litigants for the purposes of the litigation. A protective order can safeguard the confidentiality of the materials to the extent consistent with a fair hearing of the allegations of the plaintiff.

In sum, there are understandable reasons why academic institutions — indeed all professional groups[5] — strive to

[5] The periodic claims of various professional groups for recognition of an evidentiary privilege concerning their professional communications and papers, *cf. United States* v. *Arthur Young & Co.*, 465 U.S. 805, 104 S.Ct. 1495, 79 L.Ed.2d 826 (1984), appear in part motivated by a desire to achieve enhanced professional status. If, as Shaw contended, "all professions . . . are

maintain the general confidentiality of tenure votes and peer reviews. The university's desire to protect the confidentiality of its evaluation procedures, however, cannot transcend the need to have all relevant information available to a plaintiff alleging a violation of federal anti-discrimination law. The normal mechanisms of discovery are tools well-suited for a court's use in striking a fair balance between these competing interests. That balance should not be thrown out of alignment by overemphasis upon the concerns of academics that their decision-making process has some special claim to be conducted in secrecy.

2. The Destruction of Documents

When the plaintiff commenced this action, she served defendants with her First Request for Production of Documents. This included a request for the tenure files of every male who had ever been granted tenure at the Business School. On March 5, 1986, the Magistrate ordered that plaintiff be allowed discovery of the files of successful male candidates for tenure during only the 1981-1984 period. Plaintiff appealed the narrow scope of the Magistrate's ruling, and on August 12, 1986, Judge Garrity "modifie[d] the magistrate's order to permit discovery of the tenure files of men who were granted tenure between 1974 and 1984." *Jackson*, 111 F.R.D. at 476.

After Judge Garrity's August 1986 ruling, plaintiff and the court learned that defendants would not be able to comply

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. . . conspiracies against the laity," G.B. Shaw, *Preface to The Doctor's Dilemma: A Tragedy* (1906), in XII *Ayot St. Lawrence Edition of the Collected Works of Bernard Shaw* 11 (1930), there is no better way to further the ends of the conspiracy than to shroud its communications in secrecy. But an evidentiary privilege is not a badge of professional distinction; it is — or should be — a highly functional and strictly limited device for advancing some particular professional role as to which society is willing to pay the severe cost of being deprived of relevant evidence when communications and documents concerning that role are put in issue. Nothing in the nature of academic tenure decision making supports a determination to pay such a cost in anti-discrimination proceedings.

fully with the Judge's discovery order, because the majority of the requested tenure files had been destroyed in April or May of 1986, shortly after issuance of the Magistrate's order.

The destruction of documents can merit the inference that the contents of the destroyed documents were unfavorable to the party that destroyed them. The First Circuit has observed that:

> The general principles concerning the inferences to be drawn from the loss or destruction of documents are well established. When the contents of a document are relevant to an issue in a case, the trier of fact generally may receive the fact of the document's nonproduction or destruction as evidence that the party which has prevented production did so out of the well-founded fear that the contents would harm him. Wigmore has asserted that nonproduction is not merely "some" evidence, but is sufficient by itself to support an adverse inference even if no other evidence for the inference exists:
>
> > The failure or refusal to produce a relevant document, or the destruction of it, is evidence *from which alone* its contents may be inferred to be unfavorable to the possessor, provided the opponent, when the identity of the document is disputed, first introduces some evidence tending to show that the document actually destroyed or withheld is the one as to whose contents it is desired to draw an inference.
>
> 2 *Wigmore on Evidence* § 291, at 288 (Chadbourne rev. 1979) (emphasis added). The inference depends, of course, on a showing that the party had notice that the documents were relevant at the time he failed to produce them or destroyed them.

Nation-Wide Check Corp. v. *Forest Hills Distribs., Inc.*, 692 F.2d 214, 217-18 (1st Cir. 1982); *see also Petition of United States*, 255 F.Supp. 737, 740 n. * (D.Mass. 1966), *aff'd in pertinent part and rev'd in part sub nom. United States* v. *Sandra & Dennis Fishing Corp.*, 372 F.2d 189, 196 (1st Cir.), *cert. denied*, 389 U.S. 836, 88 S.Ct. 48, 19 L.Ed.2d 98 (1967). Consequently, it is necessary for me to evaluate in detail the circumstances of Harvard's destruction of documents in order to evaluate what inferences, if any, should be drawn.

At the time this litigation commenced, the subject tenure files were stored in the office of Marrilyn Reid, the Administrator for Faculty Appointments and Procedures and Secretary of the Faculty of the Harvard Business School.[6] The files remained in Ms. Reid's office until September 1985, at which time they were sent to the Inactive Records Center of Harvard University. Ms. Reid was "well aware" at the time the files were sent that they were needed for this litigation; she had been advised that the tenure files were to be preserved. However, she desperately needed to create file space in her office, and she believed the tenure files would be safe at the Inactive Records Center.

In selecting the particular files to be sent, Ms. Reid consulted with Amy Sugerman, who had become the Business School's Records Analyst in August 1985. The two women worked with one another in the selection process, but they did not communicate with respect to the various special considerations involved in the transfer. When the transfer was made, I find, Ms. Sugerman did not know about the pendency of this litigation or plaintiff's discovery request: she thought the tenure files were being transferred to be destroyed. Consequently, she filled out a "Record Disposition Application and

[6] Ms. Reid's duties included preparing the vitae of the candidates, typing the subcommittee reports, monitoring the faculty reading of the reports, and writing the promotion letters for successful candidates.

Certificate" for the destruction of the files and sent it to the appropriate administrator at the Business School.[7]

Ms. Sugerman also told Joan Glasser, the staff assistant to Richard Haas, the Records Management Officer of Harvard University's archives, that the files were to be destroyed. In fact, during September-October 1985, Ms. Sugerman and Ms. Glasser spoke between ten and twenty times. These conversations left Ms. Glasser with "no doubt" whatsoever that the records received from the Business School in September were to be destroyed.

When the tenure records arrived at the Inactive Records Center in September, they were placed in the area reserved for materials that are to be incinerated. Normally, records are not received and placed in that area unless they arrive with a completed Disposition Application. According to Mr. Haas, these records were received as an exception to the general rule because he was doing a favor for Ms. Sugerman and because he fully believed that the completed Application would be forthcoming.

On December 9, 1985, Ms. Sugerman received a memorandum from Dean Currie, the Business School's Assistant Dean for Administration and Policy Planning. This memorandum informed Ms. Sugerman, apparently for the first time, that the Business School was "in the early stages of litigation with someone who failed to be promoted to tenure. [And that] [f]or the time being, and especially now when we are in the 'discovery' process, our attorneys say that we shouldn't throw

[7] The Disposition Application filled out by Ms. Sugerman is a form — actually two forms — which, pursuant to a policy adopted by the Harvard Corporation in 1939, must be completed before any Business School or other University records may be destroyed. Completion of the Application requires the signatures of four persons: (1) the chairman of the applicable department; (2) the Business School, or other appropriate, librarian; (3) the Secretary of the Harvard Corporation; and (4) the Director of the University's library. There is no evidence that the Application filled out by Ms. Sugerman was ever signed by any of the requisite four persons. The form itself was either lost or destroyed. In any event, it was never produced during discovery, and was not introduced into evidence during the trial.

anything away." Ms. Sugerman sent a copy of Dean Currie's memorandum to Rick Haas and Marrilyn Reid two days after she received it.

On December 16, 1985, Rick Haas sent a memorandum to Ms. Sugerman in which he acknowledged his agreement with the directive expressed in Dean Currie's memorandum. Two days later, Ms. Sugerman called Mr. Haas to make sure that the tenure records which had been sent to the Inactive Records Center in September would not be accidentally destroyed. She memorialized her telephone conversation with a handwritten note to herself at the bottom of Mr. Haas's December 16th memorandum. This note states:

> Called Rick 18 Dec asking him if the records for Marilyn now stored in the "hold" area for incineration would be safe there and wouldn't be destroyed accidentally with the Admissions files which were moved to the hold area at the same time. He said "absolutely not" — that he personally lets the movers in and supervises them as to which boxes to take.

Mr. Haas claims that following his conversation with Ms. Sugerman, he informed Ms. Glasser of the necessity of preserving the Business School's tenure records. He did not, however, write any sort of note or memorandum to this effect, and Ms. Glasser vehemently denies that she was ever told that the subject tenure records had to be preserved. Moreover, no one associated with the Inactive Records Center ever followed the Center's routine procedure of recording the subject tenure records on the "shelf list" of records to be preserved.

In late April or early May of 1986, a moving company employed by Harvard University to transport documents for purposes of destruction removed the boxes containing the subject tenure records from the Inactive Records Center. Ms. Glasser supervised the removal of the boxes, having been directed by Mr. Haas to let the movers take every box in the area of the

Center where the tenure records had been stored since September.

The records were removed and destroyed without a Disposition Application ever having been presented to the Inactive Records Center. They appear to have been the first Business School records every removed from the Inactive Records Center. They were apparently the only records of any sort to have been destroyed without a completed Disposition Application since the advent of the 1939 University-wide policy regarding records retention.

3. The Defaults and Delays in Discovery

Plaintiff first became aware of the existence of highly material documentary evidence concerning the rapid evaluation of support for her 1981 tenure candidacy near the end of trial — three and one-half years after the commencement of the litigation.[8] The evidence was in the form of a tally sheet which set forth the actual results of the two 1981 votes on her candidacy.

The late arrival in the case of the tally sheet and the obviously relevant information contained on it was not the fault of plaintiff. Plaintiff had made a timely discovery request to which production of the tally sheet would have been responsive. Not only did defendants fail to turn over the tally sheet during discovery, but defendants' counsel misled the court, during a hearing held on February 17, 1988 to consider defendants' motion for summary judgment, by representing that all tenure "ballots are routinely destroyed after the vote is taken."

Moreover, a full month after the culmination of the trial, defendants' counsel stated in a submission to the court that "[i]n reviewing why the 1981 tally sheet was not produced earlier, and in an effort to make certain that all responsive documents had been produced, a broader review was made over the last two days. In the course of this review other papers

[8] This disclosure came during the cross-examination of Dean Gordon Donaldson after inquiries from me concerning relevant records.

have been identified which were responsive to plaintiff's discovery requests and were not previously produced to plaintiff." After receiving these "other papers," plaintiff moved to reopen the evidence. I granted that motion. Thereafter, certain additional documents were submitted in evidence by agreement of the parties. Thus, as a result of defendants' neglect in complying with their discovery obligations, plaintiff was prejudiced in the development of her pre-trial strategy and the resolution of this case was unnecessarily delayed.

B. *Remedies for the Limitations*

Immediately after plaintiff became aware of defendants' discovery violations (and before she had obtained a copy of the tally sheet), she moved, pursuant to Fed.R.Civ.P. 26(g), 37(b), and 37(d), for sanctions. She requested that the defendants be precluded from offering any evidence concerning the votes of the tenured faculty in 1981 and 1983. This request was the culmination of plaintiff's efforts to obtain the benefit of affirmative evidentiary sanctions such as adverse inferences and preclusion orders to overcome the effect of the evidentiary suppression caused by the erroneous privilege, documentary destruction, and discovery delay. My legal analysis of adverse inference sanctions and preclusionary remedies is set forth below in Sections III.B.1. and III.B.2., respectively.

Instead of employing adverse inferences or preclusionary orders, I offered to remedy Harvard's negligent suppression of evidence by reopening discovery and allowing plaintiff to make further inquiry unconstrained by the limitations of an academic privilege. This offer provided plaintiff with the opportunity to develop for herself a remedial program closely tailored to meet the problems created by, for example, defendants' failure to disclose the tally sheet and other relevant information until the conclusion of trial in a four-year-old case. My offer, if accepted, could have made available to plaintiff — and the court — relevant evidence necessary to the

determination of the ultimate issue in this case: whether defendants discriminated against plaintiff in denying her tenure. The plaintiff, however, rejected the offer and chose, as set forth more fully below in Section III.B.3., not to pursue further discovery.

There is no doubt that a major problem in this litigation has been the unavailability of relevant evidence, caused by the assertion of an unwarranted privilege, the destruction of relevant tenure records, and the belated and begrudging disclosure of critical ballot documents such as the tally sheet. As a policy matter, however, I rejected the adverse inference and preclusion remedies proposed by plaintiff because they would have exacerbated the underlying problem further. Such remedies would have continued to circumscribe unnecessarily the evidence available for my fact finding:

1. The Adverse Inference Remedy for Document Destruction

[9] Defendants offered two reasons why I should not draw an adverse inference from the destruction of documents:

(1) The files destroyed presumably included the tenure records of unsuccessful as well as successful male candidates. Defendants maintained that if the records of the unsuccessful males had been available, they would have shown that men were denied tenure on the same or similar grounds as plaintiff, and that the Business School's promotion standards were applied in a consistent, gender-blind manner. They contended that the destruction of the records therefore hurt their case as much as, if not more than, plaintiff's.

(2) The records were inadvertently destroyed after the Business School sent them out for safekeeping. Defendants averred there was no intent to destroy evidence, and in fact every intent to preserve it. They maintained that the loss of the evidence was due to errors made at the Inactive Records Center, whose manager, Mr. Haas, was not directly affiliated with the

Business School, and who had assured the Business School that he would personally see to the security of the relevant documents; and whose negligence accordingly should not be imputed to defendants. Defendants contended they should not suffer the extraordinary consequence of having a significant evidentiary inference drawn against them because someone over whom they had little or no control made a mistake.

I found defendants' first argument meritless. Speculation that destroyed documents may have proven helpful to defendants is hardly a reason not to draw a negative inference from what was at best negligent behavior on defendants' part. While the records of unsuccessful male candidates could have aided defendants' case, they also could have damaged defendants' case, for instance, by showing that those men were denied tenure only because their records were substantially poorer than plaintiff's. The point is that we do not know what those documents would have shown. We are left with speculation, attributable to defendants' failure to do what they should have done.

However, defendants' failure was not intentional. And for that reason, I found compelling defendants' second ground for opposing the negative inference. Although there was initial confusion as to whether the subject tenure records were sent to the Inactive Records Center for preservation or for destruction, long before the actual destruction of the records that confusion had been cleared up.

Dean Currie specifically notified Amy Sugerman in December 1985 that the subject records were to be preserved. Amy Sugerman in turn passed this information on to Richard Haas, who gave her absolute assurance that the records would not be destroyed. Thus, five to six months before the records were actually destroyed, defendants had taken some precautions to make sure the records would be protected. Of course, in retrospect it is obvious that the precautions were inadequate and that the Business School should have done more to protect the records. Ms. Sugerman should, for instance, have requested

that Mr. Haas immediately transfer the records to the General Counsel's Office of the University. However, I refused to penalize defendants for having failed to take the most prudent course. Defendants were negligent, but they did not act in bad faith: they did not intentionally have the documents destroyed.

First Circuit case law suggests that my authority to draw a negative inference against defendants is not wholly dependent upon a finding of bad faith. Under the principle adopted by the First Circuit in *Nation-Wide Check*, I "*may* receive the fact of the document[s'] ... destruction as evidence that [defendants] fear[ed] that the contents would harm [them]," 692 F.2d at 217 (emphasis supplied), apparently regardless of whether defendants acted in good or bad faith. However, I am not obliged to draw that inference, and here I chose to exercise my discretion by not drawing it.

I would, no doubt, have reached a different conclusion if plaintiff had produced any evidence showing that defendants destroyed the subject records to avoid disclosure in this litigation. However, the drawing of a negative inference under the circumstances of this case, an act which would be all but a declaration of victory for plaintiff, is unwarranted. Here, the evidence shows merely that a person — Richard Haas — who was not under the direct supervision or control of the Business School, made a mistake. To impute his error to Business School decision makers and declare that, as a result of it, defendants must set aside by default a tenure decision that was reached over painstaking hours by the tenured Business School faculty, would be an unduly harsh remedy. It is one I have chosen not to impose. *See Allen Pen Co.* v. *Springfield Photo Mount Co.*, 653 F.2d 17, 23-24 (1st Cir. 1981) (Plaintiff "has not shown that the document destruction was in bad faith or flowed from the consciousness of a weak case. There is no evidence that [defendant] believed the [destroyed pieces of evidence] would have damaged it in a lawsuit. Without some such evidence, ordinarily no adverse inference is drawn from [defendant's]

failure to preserve them."); *Eaton Corp.* v. *Appliance Valves Corp.*, 790 F.2d 874, 878 (Fed. Cir. 1986) ("If a court finds that both conditions precedent, evidence destruction and bad faith, are met, it may then infer that the evidence would be unfavorable to the destroying party if introduced in court."); *Coates* v. *Johnson & Johnson*, 756 F.2d 524, 551 (7th Cir. 1985) ("The prevailing rule is that bad faith destruction of a document relevant to proof of an issue at trial gives rise to a strong inference that production of the document would have been unfavorable to the party responsible for the destruction. . . . [The facts of this case) suggest that the documents were destroyed under routine procedures, not in bad faith, and thus cannot sustain the inference that defendants' agents were conscious of a weak case.") (citations omitted); *S.C. Johnson & Son, Inc.* v. *Louisville & Nashville R.R. Co.*, 695 F.2d 253, 258-59 (7th Cir. 1982) (Before a court may draw a negative inference from a party's destruction of evidence it must be convinced "that the party did so in bad faith.") (citing *Commercial Ins. Co.* v. *Gonzalez*, 512 F.2d 1307, 1314 (1st Cir.), *cert. denied*, 423 U.S. 838, 96 S.Ct. 65, 46 L.Ed.2d 57 (1975)).

When Harley Holden, the Curator of the Harvard University Archives, learned of the destruction of the subject tenure records, he told Mr. Haas, "It's a terrible mistake and it should not have happened." Mr. Holden was correct. However, I find that although "terrible," the destruction of the tenure records was in fact a mistake. It was not a purposeful or intentional act on the part of the defendants designed to suppress evidence. I find that it is more likely than not that the records were destroyed because of miscommunication between Mr. Haas and Ms. Glasser, and because the records were stored at the Inactive Records Center directly adjacent to boxes containing material for which Disposition Applications had been properly completed. For this the sanction of adverse inference would be disproportionate.

2. The Preclusionary Remedy for Discovery Default

[10] Faced with the belated discovery of documents concerning the ballots on her tenure candidacy, plaintiff requested that I punish defendants for their discovery default by precluding them from offering any evidence concerning the votes of the tenured faculty in 1981 and 1983.

An order "prohibiting [a disobedient] party from introducing designated matters in evidence" is, of course, one of the sanctions available to a court faced with violation of its discovery orders. Fed.R.Civ.P. 37(b)(2)(B). However, although "[t]he district court has considerable discretion in policing alleged discovery transgressions[,] ... preclusion is a grave step, and by no means an automatic response to a delayed disclosure." *Freeman* v. *Package Machinery Co.*, 865 F.2d 1331, 1341 (1st Cir. 1988).

The *Freeman* court cited a Ninth Circuit precedent for the proposition that an "order excluding evidence should not be imposed where failure to make discovery [is] not willful." *Id.* (citing *United States* v. *Sumitomo Marine & Fire Ins. Co.*, 617 F.2d 1365, 1369 (9th Cir. 1980)); *cf. National Hockey League* v. *Metropolitan Hockey Club*, 427 U.S. 639, 96 S.Ct. 2778, 49 L.Ed.2d 747 (1976) (per curiam) (a district court may resort to the extreme sanction of dismissal for discovery violations attributable to "flagrant bad faith" and "callous disregard" of responsibilities). Although the question is a close one, I have concluded that defendants' default here resulted not from willfulness but rather from negligence occasioned by the push and shove which documentary production in this case entailed. To be sure, the documents were the subject of an appropriate demand; the demand, however, was resisted verbally and the plaintiff did not follow up with a request for specific court action. I do not underplay the misleading character of defendants' responses to plaintiff and the court, but, on balance, I believe that more foundation would have had to

have been laid to show bad faith or willfullness here. I therefore exercised my "discretion *not* to impose sanctions." *Benitez-Allende* v. *Alcan Aluminio do Brasil, S.A.*, 857 F.2d 26, 33 (1st Cir. 1988), *cert. denied*, ____ U.S. ____, 109 S.Ct. 1135, 103 L.Ed.2d 196 (1989) (emphasis in original).[9]

3. The Plaintiff's Failure to Pursue Evidence

[11] Plaintiff gave four reasons for her refusal to take advantage of the remedial opportunity I afforded her to pierce the academic privilege and pursue further evidence. She contended that: (1) After four years of litigation she was emotionally and financially spent, and felt unable to bear the additional burden that the further imposition of discovery would have imposed; (2) Defendants were at fault for the late arrival of the documents and the burden should be on them to explain the dramatic swing in Ms. Jackson's support — to the extent defendants failed to carry this burden, negative inferences should be drawn against them; (3) Under a cost-benefit analysis, it would be highly unlikely, especially given defendants' knowledge of plaintiff's theory of the case, that anything definitive would turn up if further discovery were undertaken; and (4) Piercing the academic privilege would provide defendants with an appellate issue, collateral to the merits, that would be time consuming and would deflect attention from the heart of the case.

Although I understood plaintiff's analysis, I did not find that by rejecting the opportunity to pursue evidence plaintiff had entitled herself to either an adverse inference or a preclusionary sanction. Plaintiffs who take on large, well-endowed institutions are on notice that heavy emotional and financial costs are likely in the litigation, *see generally* G. LaNoue & B. Lee, *Academics in Court — The Consequences of Faculty Discrimination Litigation* (1987), and that the only thing pre-

[9] I have, however, by endorsement on the motion, allowed so much of the plaintiff's request for sanctions as sought attorneys' fees and costs in the amount of $935.00.

dictable about litigation is that it will take unpredictable and time-consuming twists and turns. At every stage in the process, litigants must perform cost-benefit analyses and bear responsibility for the consequences of their decisions. The judgment by plaintiff here that piercing the academic privilege would not prove beneficial was a considered decision, but it was not a decision for which plaintiff could claim a favorable evidentiary construct as second prize.

Defendants were at fault for the conduct of their discovery responsibilities. They deserved to be sanctioned for this behavior. However, the sanction needed to be one appropriate to the truth-finding process, not one that turned upon the emotional and financial convenience of the plaintiff and served only further to suppress evidence. I offered an appropriate sanction and the plaintiff rejected it.

The defendants' obliviousness to discovery obligations should not have required them to carry the burden, for example, of explaining why plaintiff lost so much support over a 25-day period in November and December 1981. Such a sanction would have radically transformed the burdens in this case. The defendants' burden was to articulate a legitimate, nondiscriminatory reason for having denied plaintiff tenure. Plaintiff's burden was to prove that she was denied tenure because of her gender. That burden ordinarily never shifts to defendant and the failures of discovery in this case did not justify shifting it.

The explanation of why plaintiff's support dissipated between the two meetings of the Full Committee in 1981 may well have been relevant to the ultimate factual issue of whether defendants discriminated against plaintiff because of her gender. However, the mere fact of the dramatic dissipation tells me nothing one way or the other with respect to this issue. It was plaintiff's burden to establish the link between the dissipation and sex discrimination, and it was a burden plaintiff decided not to shoulder by conducting further discovery.

Despite the late date of my offer, therefore, I find that plaintiff was afforded a full and fair opportunity to conduct all appropriate discovery on the issues for which she bore the evidentiary burden. Plaintiff waived this opportunity.

I turn, now, to the facts established by the evidence actually adduced at trial.

IV. FINDINGS REGARDING DIRECT EVIDENCE

A. *The Plaintiff*

Barbara Jackson received her Ph.D. degree in applied mathematics from Harvard University in 1973. She joined the faculty of the Business School that year as an Assistant Professor of Business Administration. Her initial appointment was from March 1, 1973 until June 30, 1977. In 1977, she was promoted to Associate Professor and reappointed for a five-year term from July 1, 1977 to June 30, 1982.

During her first four years at the Business School, Ms. Jackson taught and conducted research in the Managerial Economics Area.[10] In 1977, she decided to change her field of specialization to Marketing, and over the course of the next two years, she gradually transferred into the Marketing Area. Broadly described, the move from Managerial Economics to Marketing was a move from theory to practice, from abstraction to application. It was a change that many others on the Business School faculty had made before her; nonetheless, it was a change that Ms. Jackson undertook with some trepidation. She was concerned that the move would place her at a disadvantage when she came up for tenure review, because she would have had less time to demonstrate accomplishment and promise in her new field than would someone who had devoted his or her entire professional career to that field.

The administration of the Business School reassured Ms. Jackson that her tenure review would not be limited to her

[10] "Area" is synonymous with "department."

work in Marketing, but would include evaluation of her record as a whole. She was told that her work in Managerial Economics and the brevity of her exposure to Marketing would be taken into consideration in making her tenure decision. Thus reassured, Ms. Jackson completed the process of transferring to the Marketing Area in 1979. It was as a member of the Marketing Area that Ms. Jackson was reviewed for tenure in 1981 and then again in 1983.

B. *The Business School's Tenure Review Process*

An individual's candidacy for tenure at the Business School is initially reviewed by a Subcommittee of four tenured professors appointed by the Dean. The candidate does not have control over which faculty members will or will not serve on his or her Subcommittee.[11] However, candidates are routinely afforded the opportunity to inform the Dean of the names of any persons they prefer not be on their Subcommittees, and the candidates' requests are routinely honored.[12]

The Subcommittee examines the candidate's entire academic record — including teaching, course development, and research — and solicits the confidential opinions of faculty members at the Business School, faculty at other institutions, and business practitioners, as appropriate. The Subcommittee measures the candidate's record of achievement and performance against the standards set forth in the Business School's "Policies and Procedures with Respect to Faculty Appointments and Promotions," and then writes a report of its findings. The Subcommittee's Report typically contains a recorded vote by Subcommittee members on whether the candidate has

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[11] Until 1982, the Dean appointed different subcommittees for each person who came up for tenure in a given year. Since 1982, the Dean has appointed a Standing Subcommittee, which evaluates all candidates in a given year.

[12] Under the post-1982 "Standing Subcommittee" regime, the members of the Standing Subcommittee for a given year are announced before evaluations commence, and candidates are afforded the opportunity to object to individual members.

met the standards necessary for promotion with tenure, and whether the candidate should, in any event, be recommended for tenure.

The Subcommittee's Report is presented to the entire tenured faculty sitting as the Faculty Advisory Committee on Appointments ("Full Committee"). The Full Committee numbers 80 or more professors, of whom approximately 60-70 normally participate and vote. The candidate's Subcommittee Report is available to the Full Committee before, and is considered during, the deliberations of the Full Committee, along with individual faculty member opinions, assessments, and reflections about the candidate and his or her work. The Subcommittee Report plays a substantial role in framing the Full Committee's discussions, but it is not conclusive or dispositive. The recommendations of the Subcommittee may be disregarded by the Full Committee, and it is the Full Committee's vote that constitutes the faculty view concerning whether the candidate should receive tenure.

The Full Committee, with the Dean presiding, ordinarily meets twice to consider a candidate. During the first meeting, the Full Committee typically has a wide-ranging discussion of the candidate, followed by a preliminary vote in which the individual tenured faculty members vote by signed ballot. The Full Committee then adjourns and regathers within 30 days to have a second and final discussion about the candidate. At the end of this second meeting, the members once again vote by signed ballot.

The Full Committee vote is advisory in form. The Dean is not bound by the results, and it is the Dean who determines whether to recommend to the President and governing bodies of the University that a candidate receive tenure. In making his determination, the Dean accords considerable weight to the final vote of the Full Committee. In fact, never in the history of the Business School has a candidate received less than "substantial majority" support from the Full Committee and still been recommended for tenure by the Dean. Receipt of

substantial majority support is not a guarantee that the Dean will recommend tenure, but failure to receive a substantial majority insures the denial of tenure. The Dean's decision whether or not to recommend appointment with tenure is *de facto* final. Harvard's President and governing bodies have never overridden a recommendation by the Dean of the Business School that a candidate be granted tenure; and when the Dean decides against recommending tenure, with rare exceptions, no further action is taken on the candidacy.

C. *The 1981 Tenure Review*[13]

1. The Subcommittee in 1981

[12] Barbara Jackson first became eligible for tenure consideration in 1981. She submitted her portfolio in August 1981,

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[13] Defendants argue that the 1981 tenure denial, which occurred outside the 240-days limitations period, *see Johnson* v. *General Elec.*, 840 F.2d 132, 133 (1st Cir. 1988), and was not mentioned in plaintiff's complaint, is not actionable. They concede the 1981 decision's relevance as "'background evidence'." *Cajigas* v. *Banco de Ponce*, 741 F.2d 464, 470 n.13 (1st Cir. 1984) (quoting *United Air Lines* v. *Evans*, 431 U.S. 553, 558, 97 S.Ct. 1885, 1889, 52 L.Ed.2d 571 (1977)).

Defendants point to *Cajigas*, in which the First Circuit did not "rule squarely" on "whether the 'continuing violation' theory should operate to allow recovery with respect to a distinct act of discrimination taking place at an identifiable point of time outside the limitations period," but "at least one member of the panel doubt[ed]" whether it should. *Id.* (dicta) (footnote omitted). Although the First Circuit recently revisited the issue, holding that serial discriminatory acts constitute a continuing violation of Title VII if "they involve an interlinked succession of related events or a fully-integrated course of conduct," *Mack* v. *Great Atl. and Pac. Tea Co.*, 871 F.2d 179, 183 (1st Cir. 1989), the court addressed the actionability of only the later acts, i.e., those occurring during the limitations period.

I find that the 1981 decision may be considered actionable here as part of a "continuing violation" of Title VII regardless of the resolution of this question. The 1981 tenure review decision was not so much "a distinct act of discrimination" as part of an extended process. Dean McArthur himself described the 1981 events as not a tenure denial but a decision to extend tenure review. Hence, the 1981 and 1983 reviews can be viewed as constituting one continuing violation that became actionable upon the 1983 denial of tenure,

and soon thereafter submitted a list of four faculty members whom she requested not be on the Subcommittee that would evaluate her work. She based her request on her impression that three of the four were biased against women and that the fourth was incompetent to judge her scholarship. Despite Ms. Jackson's request, Professor Stephen Bradley, one of the three persons she regarded as biased against women, was placed on her Subcommittee.

Ms. Jackson's Subcommittee met in the autumn of 1981 and prepared a Report on her candidacy. The Subcommittee members voted 3-1 that Ms. Jackson had met the standards necessary for promotion with tenure, and they voted 4-0 to recommend to the Full Committee that she receive tenure. Professor Bradley cast the lone vote against Ms. Jackson's qualifications, but recommended that she receive tenure as an exception to the Standards.

2. The 1977 Standards and the 1981 Standards

The "standards" against which the Subcommittee officially evaluated Ms. Jackson's work were those contained in the Revised June 1981 version of the Business School's "Policies and Procedures with Respect to Faculty Appointments and Promotions" [hereinafter "1981 Standards"]. These 1981 Standards replaced the 1977 "Policies and Procedures with Respect to Faculty Appointments and Promotions" [hereinafter "1977 Standards"]. Although promulgated in June 1981, the 1981

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when plaintiff became aware that she would in fact be injured. *See Johnson*, 840 F.2d at 137. "If plaintiff *had* instituted [her] discrimination claim in 1981, before the results of the [tenure review process] had been determined, it is likely it would have been dismissed as unripe, since at that point it was undetermined whether the review process would in fact cause plaintiff any injury." *Id.* at 137-38.

Of course, my ultimate finding that plaintiff was not the victim of gender-based discrimination reduces to a nullity this issue of the actionability of the 1981 decision. Accordingly, even if I viewed the 1981 decision as the basis of a wholly independent Title VII claim — and plaintiff does not expressly argue that I should — defendants would still prevail.

Standards were not distributed to the non-tenured Business School faculty until September 15, 1981. In other words, the text of the Standards under which Barbara Jackson was evaluated for tenure was not available to her until *after* she had submitted her tenure portfolio.

Ms. Jackson maintains that the 1977 and 1981 Standards are materially different. She contends that in preparation for her 1981 tenure review she developed her portfolio of academic work with reference to the 1977 Standards, that she expected to be evaluated under those standards, that she met those standards, and, therefore, that she should have received tenure. She contends that the fact that her tenure candidacy was evaluated under Standards published after her portfolio was submitted should be considered substantial evidence that she was not given a genuine opportunity to receive tenure in 1981.

I find, however, that the differences were not material; and that, even if they were, the 1981 Standards were applied to Ms. Jackson in a way that did not prejudice her. Ms. Jackson was *formally* reviewed for tenure in 1981 under the 1981 Standards; however, she was *effectively* evaluated under the 1977 Standards.

Plaintiff maintains that the core difference between the 1977 Standards and the 1981 Standards was that under the former a Business School professor had to demonstrate excellence in *either* a) teaching and course development, *or* b) research, to be qualified for tenure, whereas under the latter the candidate was deemed unqualified unless he or she could demonstrate excellence *both* in teaching and course development *and* in research.

Dean McArthur and Dean Gordon Donaldson[14] testified that the 1977 and 1981 Standards represented two snapshots at

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[14] Dean Gordon Donaldson became a tenured member of the Business School faculty in 1963. He served as faculty Appointments Coordinator from 1975 until early 1980. Shortly after John McArthur became Dean of the Business School in January 1980, Professor Donaldson was appointed Senior Associate Dean for Faculty Development, a position he held until April 1986. As Appointments Coordinator and Senior Associate Dean for Faculty

different times of an evolving consensus among the tenured faculty at the Business School concerning the profile future tenured faculty members should have.

The policies in place at the Business School during the 1960's and 1970's allowed professors to come up for tenure on either a teaching track or a research track. The unintended consequence of this two-track system had been the creation of a two-caste tenured faculty, one caste consisting of researchers and the other caste of teachers. This dichotomy came to be seen as not conducive to collegiality. The tenured faculty gradually decided that the way to eliminate the schism that had been created would be to require excellence in both teaching and research from future tenure candidates. This policy evolved over a two-decade period and different stages in that evolution were captured in the 1977 and 1981 written Standards.

The difference between the requirements for tenure at the Business School in the quarter century between the early 1960's when Deans McArthur and Donaldson received tenure and the requirements today may be substantial. However, the actual difference between the 1977 and 1981 Standards at issue here is not nearly as dramatic as plaintiff has maintained. Those Standards are not materially different. They represent separate points along an evolutionary path, but the points are sufficiently close together so as to be indistinguishable for purposes of this litigation.

Plaintiff alleges that the core differences between the 1977 and 1981 Standards may be seen by comparing paragraph 6 of the 1977 Standards with paragraph 5 of the 1981 Standards. Paragraph 6 of the 1977 Standards provides in relevant part:

Development, Professor Donaldson was the person primarily responsible for managing the entire promotions process, including the process by which associate professors at the Business School were reviewed for promotion to tenured professorships. Professor Donaldson drafted both the 1977 and 1981 Standards, and in both 1981 and 1983 he managed Barbara Jackson's tenure review process.

> [F]or the large majority of its tenured Faculty, the School seeks persons who:
>
> a) have demonstrated effectiveness in classroom teaching and course maintenance;
> b) have demonstrated excellence in research or creative course development, or both;
> c) have demonstrated outstanding performance, overall, when teaching, research, and course development are taken together.

Paragraph 5 of the 1981 Standards provides in relevant part:

> [F]or the large majority of its tenured faculty the School seeks persons who:
>
> a) have demonstrated effectiveness in classroom teaching and in the normal maintenance of established course materials; and
> b) have demonstrated the excellence of their published work based on research and creative course development, the mix of which may appropriately vary widely across the pool of candidates; and
> c) have provided persuasive evidence of the capacity for intellectual leadership and for self-renewal essential to a productive tenured academic career.

These paragraphs and the provisions contained in each should not, of course, be read in isolation from the remainder of the respective Standards, which indicate that the tenure requirements in those paragraphs are not be read as setting out a rigid calculus.[15] However, even if read in isolation from the

[15] *See, e.g.*, 1977 Standards ¶ 1 ("This general statement of policy cannot be exhaustive and it should not be treated literally in all cases. The task of building a university graduate school faculty is a creative work which must

documents from which they are taken, these paragraphs establish substantially identical requirements for tenure. It is apparent, and the parties agree, that paragraph 6(a) of the 1977 Standards and paragraph 5(a) of the 1981 Standards state precisely the same requirement, namely the requirement of excellence in classroom teaching and in the routine maintenance of course materials. It is also apparent, and all but conceded by both sides, that paragraphs 6(c) and 5(c) of the 1977 and 1981 Standards, respectively, establish identical requirements. And it is indisputable that even though paragraph 6 of the 1977 Standards does not contain the word "and" at the end of either provision "a" or provision "b," its provisions are conjunctive, as are the three provisions of paragraph 5 of the 1981 Standards.

Plaintiff maintains that the central difference between the two paragraphs resides in the respective "b" provisions. She contends that while 1977 paragraph 6(b) requires "excellence in research *or* creative course development," 1981 paragraph 5(b) requires excellence in "research *and* creative course development."

Plaintiff's construction of the respective "b" provisions ignores the segment of paragraph 5(b) that follows the comma after the words "course development." This segment effectively reduced the "and" which joins "research" and "creative course development" to an "or"; after all, if, as the provision provides, "the mix [of research and creative course development] may appropriately vary widely across the pool of candidates," it may vary with respect to a particular candidate almost to the point where the candidate may excel just in research *or* just in creative course development. Thus the conjunctive in paragraph 5(b) of the 1981 Standards appears to be

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call for the exercise of judgment on many considerations in a variety of combinations."); 1981 Standards ¶ 1 ("This general statement of po[illegible] cannot be exhaustive. The task of building a university graduate sc[illegible] faculty is a creative work which must call for the exercise of judgm[illegible] on many considerations in a variety of combinations which cannot be detailed in advance.").

effectively the equivalent of the disjunctive in the 1977 Standards. For this reason, I have concluded that the 1977 Standards were not materially different from the 1981 Standards.

However, even if they were materially different, Barbara Jackson was effectively evaluated under the 1977 Standards. This conclusion is evidenced by the fact that Ms. Jackson's Subcommittee voted 3-1 that she had met the Standards necessary for tenure. By plaintiff's own admission, no one applying plaintiff's understanding of the 1981 Standards to plaintiff's candidacy could have found her qualified for tenure in 1981, since Ms. Jackson had not done sufficient "research." Thus, the 3-1 vote indicates that at least three of the members of plaintiff's 1981 Subcommittee mixed her research and course development together in such a way as to evaluate primarily her "creative course development," i.e., as set forth in the 1977 Standards, paragraph 6(b). The Subcommittee noted that the Standards had evolved between 1977 and 1981, but "unanimously fe[lt] the differences [we]re immaterial for purposes of this case." I agree.

My conclusion that plaintiff was effectively evaluated under the 1977 Standards is also supported by the reason Harvard has articulated as the non-discriminatory reason for denying tenure to plaintiff: plaintiff's alleged failure to demonstrate sufficient creativity. This is essentially a contention that plaintiff failed to meet the requisite for tenure set out in paragraph 6(b) of the 1977 Standards.

The issue whether defendants applied the 1977 Standards in a disparate manner to plaintiff and to male candidates for tenure is addressed *infra* in Section V.C. For present purposes, I note here my finding and conclusion that the non-sex-based standard to which defendants point to meet their burden of proof under Title VII is fully consistent with application of the 1977 Standards. In other words, as a matter of fact, even if there is a formal difference between the 1977 and 1981 Standards, plaintiff was effectively evaluated for tenure in 1981 by the very standards against which she had prepared herself to be evaluated.

3. The Full Committee in 1981

The Subcommittee's unanimous recommendation that Ms. Jackson receive tenure was presented to the Full Committee for preliminary consideration on November 17, 1981. Sixty-three tenured faculty members were present at this preliminary meeting. Following a wide-ranging discussion of her candidacy, sixty-one members voted on the question. Forty-seven persons voted to grant tenure, seven voted to terminate her, one voted that she be reappointed without tenure, and six abstained. The sixty-one persons voting included the eight members of Ms. Jackson's department — the Marketing Area. The eight Marketing professors all voted that Ms. Jackson be promoted. It is undisputed that the level of support Ms. Jackson received on this preliminary ballot constituted the "substantial majority" required for a tenure recommendation.

Twenty-five days after the preliminary vote, the Full Committee reconvened for its final consideration of plaintiff's candidacy for tenure. When the votes were tallied at this second meeting, plaintiff's substantial majority had evaporated. Seventy-one tenured faculty members were present for the final vote, and sixty-eight voted. Twenty-nine voted to promote Ms. Jackson, twenty-seven voted to terminate her, eight voted that she be reappointed without tenure, and four abstained. Of the group of professors who had voted during the first round of voting, only twenty-five voted for promotion on the final ballot, and twenty-four voted for termination. Thus, among those who participated in both ballots, plaintiff had gone in a 25-day period from a promote to terminate ratio of 47:7 to a ratio of 25:24.

Even more remarkable than the overall dissipation of plaintiff's support was the fact that of the eight members of her own department who had voted during the preliminary round and given plaintiff their unanimous support, only four voted for tenure on the final ballot. Two who had voted for tenure on the first ballot voted to terminate; two others voted on the

final ballot for reappointment without tenure. In other words, over a 25-day period, four of the professors who had worked most closely with plaintiff changed their minds on the most important question of plaintiff's academic career. Something had happened, something rather dramatic.

Unfortunately, as noted above, the parties have not introduced evidence in the case from which I can make supportable findings as to what that dramatic something may have been.

Plaintiff's support on the final ballot was still significant, but it no longer constituted a substantial majority of the Full Committee. Therefore, in accord with the normal policy of the Business School, Dean McArthur did not recommend to the President of the University that plaintiff be promoted with tenure.

4. The 1981 Reasons for Denial of Tenure

Dean McArthur articulated the reasons for Ms. Jackson's lack of promotion in 1981 in a January 15, 1982 letter to her. In that letter he indicated that she was unsuccessful in obtaining substantial support largely because she had failed to prove creative ability sufficient to satisfy a substantial majority of the tenured faculty. According to Dean McArthur, the Full Committee regarded Ms. Jackson as an outstanding teacher. It was satisfied that she was superb at taking the ideas of others and making them accessible and comprehensible to others. A substantial majority of the Full Committee was not, however, satisfied that she was able to create new ideas. In the estimation of a substantial portion of the tenured faculty, Ms. Jackson had failed to meet the standard for tenure required under paragraph 6(b) of the 1977 Standards and paragraph 5(b) of the 1981 Standards.

The Full Committee's decision was based on a review of plaintiff's overall record at the Business School. The determination that she had not demonstrated adequate creativity was based on an evaulation of her work in *both* Managerial

Economics and Marketing. By evaluating her work as a whole, defendants fulfilled the promise that had been made to plaintiff when she transferred from Managerial Economics to Marketing, namely, that the transfer would not hurt her chances for tenure since it would not matter what area her work was done in, as long as the work was good. In this connection, I reject plaintiff's contention that the 1981 Full Committee unfairly focused exclusively on her Marketing work.

I recognize that Dean McArthur told plaintiff in December 1981 that he would not recommend her for tenure because she had not done enough work in Marketing per se. And I note that in the letter dated January 15, 1982, the Dean told Ms. Jackson that

> [a]s regards your work in marketing, there was unanimous agreement among both internal and external reviewers that you have not yet produced a record of outstanding course development or research in the broad field of marketing.

However, I reject plaintiff's invitation to read these isolated comments to mean that her work in Managerial Economics was not considered by the Full Committee in 1981, and that she was denied tenure because of failure to demonstrate creativity in Marketing research. When one views the Dean's remarks in context, it is clear that the Full Committee considered her Managerial Economics work alongside her Marketing work, and found the work in *both* areas to be insufficiently creative. For instance, on the same page of the January 15, 1982 letter relied upon by plaintiff for the proposition that only her Marketing work was considered, the Dean also states:

> The models work [in Managerial Economics] was construed to be creative pedagogy, rather than creative conceptual development. Moreover, the view that it was creative pedagogy was not unanimous. The multivariate

> work [in Managerial Economics] was thought to represent something between normal course maintenance and creative course development, and not, in any event, creative conceptual development.

I find, as a matter of fact, that when the 1981 Full Committee assessed plaintiff's creativity, it considered her work in both Managerial Economics and Marketing.

D. *1981-1983: Creating A Second Chance*

Despite the lack of a substantial majority in the Full Committee favoring tenure, Dean McArthur decided not to follow the Business School's normal practice of giving unsuccessful tenure candidates a one-year terminal appointment for the following academic year. Rather than denying tenure to Ms. Jackson, Dean McArthur arranged to hold her tenure review process in abeyance in order to give her another opportunity to demonstrate her qualifications for tenure.

In explaining the Full Committee decision to Ms. Jackson following the final vote in December 1981, Dean McArthur told her that the reason he did not want to terminate her with the usual one-year appointment was that he believed she had the capacity to develop new ideas. He told her that he was sure that, if given additional time, plaintiff could allay the doubts of the members of the Full Committee who had not supported her promotion. Consequently, the Dean recommended to plaintiff that she meet with him and other members of the tenured faculty to devise a plan to allow her to prove her creative capacity and, thereby, qualify for tenure.

1. Establishing the Post-1981 Plan

Plaintiff agreed to meet with an informal committee, made up of Dean McArthur and several tenured faculty members from the Marketing Area, to develop a vehicle that would

enable her to satisfy those who apparently did not believe she was able to create new ideas.

The informal committee met several times during the early months of 1982. As a result of these meetings, plaintiff proposed, and the informal committee agreed, that plaintiff should research and write a monograph on the subject of "account evolution paths," a subject described by plaintiff as "large, unstructured and . . . important." On March 23, 1982, following a meeting attended by plaintiff, Dean McArthur, Dean Donaldson, and several members of the Marketing Area faculty, Mr. Donaldson wrote and distributed to all attendees a memorandum containing his "understanding of the major areas of agreement at the meeting". In his memorandum, Mr. Donaldson wrote that "[t]he objective of the work Barbara Jackson is now undertaking is to establish her reputation as a respected researcher in Marketing."

Plaintiff regarded this statement of the standard against which her monograph would be evaluated as an unfair summary of the informal committee's consensus. Moreover, she regarded the standard as impossible to achieve for a person, such as herself, who had spent a brief time in Marketing. Plaintiff, therefore, sent a memorandum to John McArthur, Gordon Donaldson, and the other members of the informal committee summarizing *her* understanding of the results of the series of meetings that had taken place between early January and late March. In her memorandum, she explained that she understood the purpose of the monograph was to alleviate the concern "some members of the appointments committee seem to have . . . [with my] ability to create independently — and thereby to complete the evidence of my potential leadership in marketing at the School." Ms. Jackson's understanding was that she had to prove her creative potential through the monograph, and not that she had to establish herself as a complete and respected researcher in Marketing. She believed that the monograph had to prove she could create, and that it could do this without being a finished creative work in and of itself.

In a letter to Ms. Jackson dated April 14, 1982, nine days after the date of plaintiff's memorandum, Dean McArthur informed plaintiff that

> [a]fter reviewing and thinking about your memorandum and Gordon's minutes, I feel more comfortable with the draft Gordon prepared. . . . I think Gordon has captured the essence of what we discussed and tentatively agreed to at that meeting concerning your next appointment and assignment at the School. If you remain unclear or uneasy about this, I would suggest that we reconvene the group for further discussion.

Ms. Jackson discussed the differences she perceived between Dean Donaldson's memorandum and her own with Dean McArthur in his office shortly thereafter. Dean McArthur encouraged her not to draft any further memos and to get on with the project instead.

On June 9, 1982, plaintiff was reappointed as an Associate Professor of Business Administration, to serve until June 30, 1985. She was also freed from all teaching assignments so she could concentrate her energies on researching and writing her monograph.

2. Implementing the Post-1981 Plan

From early 1982 through the summer of 1983, plaintiff researched and wrote her monograph. She was in a hurry to finish because she believed that the longer the delay, the more harm would befall her reputation as an accomplished academician, which she believed to have been tarnished by the 1981 denial of tenure and by uncertainties regarding the Business School's contemporaneous search for senior faculty in the Marketing Area. By May 1983, however, certain members of the informal committee, who had continued to oversee plaintiff's progress, told Dean McArthur that they were concerned

that plaintiff was rushing her work to the point of sacrificing quality for speed.

On May 5, 1983, after a meeting with plaintiff and a professor who had been reading partial drafts of plaintiff's monograph, Dean McArthur wrote to plaintiff as follows:

> The ultimate quality of the study on which you are working is much more important to us than its completion by any particular deadline prior to June 30, 1984. Therefore, rather than adhere to the deadline for appointments which are to be reviewed in the normal sequence this academic year, we will undertake to conduct your review within approximately three months of whenever you hand in your finished manuscript. Thus, so long as a reviewable manuscript is in no later than February 28, 1984, we should be able to conduct our review of your appointment prior to the end of the 1983-1984 academic year.

In addition, plaintiff knew she could have taken until as late as the summer of 1984 to submit her monograph if she wished to be reviewed in the 1984-1985 academic year.

Despite the knowledge of her actual deadlines, and despite Dean McArthur's apparent willingness to make special accommodations for her, Ms. Jackson continued her rush to judgment in the summer of 1983. She completed a draft of her monograph in July and sought observations and criticisms from several professors within the Business School. In response to her solicitation she received a fair number of positive and encouraging comments, as well as several highly critical reviews.

Among plaintiff's most critical reviewers were Professors Theodore Levitt and Robert Buzzell, both tenured professors with endowed chairs in the Marketing Area. On August 4, 1983, Professor Levitt sent plaintiff a short note attached to

nine pages of comments on her July draft. Professor Levitt's observations included the following:

- "I remain very uneasy about the presentation, the use of 'evidence,' and the analysis."
- "[I]t is hard for me to see how the presentation has been very substantially improved over the previous version. A lot of the redundancy is gone, but a lot remains."
- "I don't think that this manuscript really does what it says it presumes to do — namely, clinical research with analysis based on it. What I mostly see is a lot of speculation about how situations really are, with very thin evidence as to what they are, and yet pretending as if the evidence were substantial and overwhelming."
- "Opinions and conclusions parade as evidence."
- "Chapter 12 ... is a potpourri of commonplaces, disjointed comments, and superficial factors that lead nowhere."
- "Chapter 15 ... Very good idea, some good comments early in the chapter. The rest is superficial, sometimes gnawing, and a potpourri of stuff. It is not research. It is not analysis. It's talk. It talks of the need for more study but doesn't say how, where, nor about the specifics of the problems and issues to be studied. It looks like the author is getting sick and tired of this whole manuscript and rushing to finish — making sure to cover all tracks by saying that the examples that have been used have indeed been simple, simplified, and simplifying, and that the analysis has been somewhat superficial. Therefore there is need for more research. It looks to me just a way of covering one's tracks."
- "In summary, I say there is something in this manuscript. There are some interesting constructs. But I

> do not think it should parade as research or rigorous development of concepts, or rigorous theoretical analysis. It is mostly a think piece, in some places really quite insightful, but elaborated into propositions that defeat communicability and credulity. The paradigm is good to help us think, but not very good as to specific guidance for specific situations. That in itself is not bad. But it is presented to us as if it were a piece of in-depth analysis and in-depth research. Yet it's devoid of empirical richness, it's light (but long) on analysis, and thus it is not persuasive. The paradigm is a creative achievement, and often the summarizing comments as to the dynamics of markets are insightful, though seldom based on the evidence the manuscript implies is there.
>
> The whole thing leaves badly torn. It is a very neat idea. I think it is quite clever, the paradigm — but presented with lengthy analytical lightness, and with claims of validity based on data that are soft but which are asserted as being hard."

On August 16, 1983, Professor Buzzell sent plaintiff a five-page letter with his reactions to her July draft. Professor Buzzell's letter included the following comments:

- "[P]resentation seems a little self-congratulatory . . . rather pompous."
- "[R]ather pretentious effect."
- "This whole discussion strikes me as force-fitting the data to a predetermined framework."
- "[N]ot really supported by data."
- "[D]on't really support the generalization. . . . Your [sic] simply assert that this happens 'in many instances'."
- "examples are purely hypothetical."

- "conclusions . . . seem rather obvious."
- "As in Chapter VII, I don't see much connection with your field data."
- "Much of this seems to be a re-hash of general knowledge."
- "purely speculative."
- "still hard to read."
- "The biggest weakness is the sparsity of direct empirical evidence on account evolution . . . the utility of the framework and of the quantitative model is not clearly shown."
- "'impressionistic' use of evidence . . . reduce[s] the credibility of the study as a whole."
- "Specifically, I would recommend: . . . Especially, presenting more evidence — if you have it — on buying patterns over time."

Plaintiff testified that she drew on what she regarded as constructive in Professors Levitt and Buzzell's criticisms and made appropriate changes in her monograph. However, she discounted much of what they wrote because she perceived them as not understanding her task, which, according to her understanding, was to produce a "think piece," not a finished product.

On August 30, 1983, plaintiff submitted her monograph on account evolution paths, and asked for a tenure decision within three months. The monograph was submitted 26 days after receiving Professor Levitt's criticisms, and just two weeks after receiving Professor Buzzell's. Plaintiff chose not to be concerned with the fact that as tenured professors in her department, Levitt and Buzzell would undoubtedly be influential in her tenure evaluation. Even though Professor Levitt had been on the informal committee established in early 1982 to formulate plaintiff's tenure project, plaintiff relied on her sense that he had misperceived the nature and scope of her charge, and effectively ignored the majority of criticisms contained in Professor Levitt's August 4th letter.

It is apparent, whatever the merits of Professors Levitt and Buzzell's criticisms may have been, that they both believed that plaintiff's work could be immeasurably improved by additional empirical research. They both believed that plaintiff's core idea was sound, interesting, and workable, and that what was needed was empirical support. In other words, their criticisms could have been addressed by additional work. However, plaintiff dismissed their central criticisms as based on a misapprehension of what she intended to be a "mere" exploratory study, and submitted her monograph six months before the deadline for tenure review during the 1983-84 academic year, and a year before what she understood to be the deadline for review in 1984-1985. At the time of the submission of the monograph, plaintiff had spent a total of 17-18 months working on it, far less than the time Harvard was willing to make available to her for the project.

E. *The 1983 Tenure Review*

1. The Subcommittee in 1983

In 1983, plaintiff's work was evaluated by the Business School's Standing Subcommittee. Plaintiff was aware of the identities of the Standing Subcommittee's members, and did not object to any of them.

The 1983 Subcommittee limited its evaluative focus to plaintiff's monograph. In September 1983, following plaintiff's submission of her monograph, the 1983 Subcommittee distributed it for review and comment to ten outside reviewers, consisting of eight academicians[18] and two practi-

[18] It appears that two of the eight outside academic reviewers of plaintiff's monograph were professors whom plaintiff regarded as inappropriate. Prior to the Subcommittee's solicitation of their reviews, plaintiff relayed her views about these persons to the Subcommittee through a professor who acted as her "conduit of information into the appointments process."

There is no evidence in the record that candidates ever had any say over who the outside reviewers of their written work would be. In addition,

tioners. The Subcommittee also solicited the opinions of members of the Business School Marketing Area. It received replies from eight of the ten outside reviewers, and from seven members of the Business School faculty. The monograph was evaluated for intellectual quality, creativity, soundness of research design and execution, and potential impact.

The standard adopted by the Subcommittee for measuring the value of plaintiff's monograph was the standard stated in the Donaldson "minutes" of March 23, 1982. The 1983 Subcommittee Report states that "[t]he [Subcommittee] has undertaken an evaluation of the monograph, particularly in light of the standards given in the Donaldson memorandum." The Report framed "the issue which the [Subcommittee] was asked to address" by asking: "Does the Jackson monograph meet an appropriate standard of excellence? . . . [Does the work] '. . . establish her reputation as a respected researcher in Marketing'[?]" The Subcommittee did not consider plaintiff's perception of the intended role of her monograph, and did not inform the individual evaluators of the monograph of the dispute between the Donaldson standard and plaintiff's view of the intended role of the monograph.

The comments received by the evaluators and conclusions reached by the Subcommittee coincided with the observations plaintiff had received from Professors Levitt and Buzzell in August 1983. Many of the comments, from both within and without the Business School, noted that the monograph seemed incomplete, inadequate, and hastily written. For example:

— "[I]t is not just a matter of a redraft, though that would help."

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plaintiff's reasons for not wanting the two persons at issue to evaluate her work had nothing to do with gender considerations. Accordingly, the inclusion of these two persons among the group that evaluated plaintiff's monograph is of only marginal relevance in this proceeding.

- "If Barbara had spent more time trying to pull her thinking together ... the manuscript would have considerably more power than it does."
- "[T]he monograph is far from being complete or in a form in which it is likely to have any significant impact."
- "In my opinion, the supporting evidence would have had greater validity if she had done more in-depth and systematic interviewing at her research sites."
- "[T]he use of information from other sources ... seems to be an opportunistic, after-the-fact force-fitting of data collected for other purposes into the framework of this study."
- "In view of the complexity of the topic she has chosen to study, it is hardly surprising that her condensed timetable has resulted in a disappointing manuscript."
- "Interesting concepts but not fully developed and an unfortunate tendency to generalize with no sufficient rationale or empirical support."
- "Some of the concepts are interesting and creative. Unfortunately they were not fully developed."
- "My sense is that the work suffers from being rushed. It is not a finished product and it is difficult to read."
- "I don't believe that the document is a completed piece of research."
- "[I]t commences in a promising manner, but does not deliver results commensurate with its promising start."
- "It is particularly disappointing to me that she had several outstanding concepts to work with, and never made them into something with the kind of impact that the ideas deserve."
- "The resulting melange is somewhat disjointed."

— "[S]he has to undertake a major revision and a serious research effort to test the hypotheses she can develop in this area."

The Subcommittee recognized that plaintiff's monograph did not receive uniformly negative reviews from all of its readers. However, the Subcommittee

> consider[ed] that the negative components of the[ ] reviews [were] sufficiently strong to rule out an affirmative finding on the issue addressed. The weight of opinion . . . indicate[s] that the monograph has not "demonstrated excellence." Further, this piece of work does little "... to establish her reputation as a respected researcher in Marketing."

Accordingly, the 1983 Subcommittee unanimously recommended against plaintiff's promotion.

Plaintiff does not dispute the negative assessments of her monograph. She maintains that if she had been asked to apply the specific Donaldson standard (i.e., the "establish her reputation as a respected researcher in Marketing" standard) to her monograph in the fall of 1983, she would have reached the same conclusions as the majority of her readers. However, she contends that the Donaldson standard was the wrong standard, indeed an impossible standard for her work to have met. She regards the fact that the Subcommittee applied that standard as symptomatic of the fundamental unfairness and pretextual nature of her entire tenure review. She maintains that the Donaldson standard was not only erroneous — it did not represent the consensus of the informal committee — but an impossible one for her to have met in the time allotted. In addition, she contends that her 1983 Subcommittee Report indicates that her second-round tenure decision was based solely on her monograph, whereas when males had received an extended tenure review, their ultimate tenure decisions did

not stand or fall on a single written work; rather, she maintains, their receipt or denial of tenure was determined by a review of the entire corpus of their work.

I find, as a matter of fact, (1) that plaintiff was not evaluated under an unfair standard in 1983; and (2) that plaintiff's entire career was taken into consideration in the ultimate decision not to recommend her for tenure in 1983.

(1) I recognize some force to plaintiff's argument that the standard under which her monograph was evaluated in 1983 was difficult to meet. Plaintiff had not even entered the field of Marketing until 1977. Between 1977 and 1982 her written work had been devoted to course development. To have expected her to produce a completely finished research paper on a complicated problem in Marketing within a two- to three-year period would have been quite demanding; and to have expected her to produce a work of sufficient quality to establish herself as a respected researcher in Marketing would have been extraordinarily ambitious. However, this is not what defendants expected. I have concluded that the Subcommittee judged plaintiff's monograph by a standard that was no different from the standard it applied to all written work by candidates for tenure at the Business School. This conclusion is based on my assessment of Dean McArthur's and Dean Donaldson's testimony, and on the fact that the 1983 Subcommittee Report states that,

> [i]n addition to evaluating the monograph in the light of the specific wording of the Donaldson memorandum, the members of the Subcommittee considered the monograph in the more general light of a piece of work by a tenured professor. We feel that it lacks intellectual rigor, whether judged as "case-method" research or as research of some other kind. . . . The research design leaves gaps in the understanding of how this research is related to other pieces of research. Further the design as well as the execution are flawed. It follows that the work we have studied

has little potential for impact. Overall this monograph does not meet a standard of excellence appropriate for tenure rank at this School.

(2) Although the 1983 Subcommittee focused its evaluation on plaintiff's 1983 monograph, plaintiff's 1983 tenure review took her entire career into consideration. As explained above, the Subcommittee evaluation and report is only one part of the Business School's tenure review process. When plaintiff's candidacy went before the Full Committee in 1983, all of her work, including her work in Managerial Economics, was taken into consideration.

2. The Full Committee in 1983

Pursuant to normal practice, the 1983 Full Committee met twice to discuss and vote on plaintiff's candidacy for tenure. On the first ballot, following the discussion at the first meeting, the vote was 19 to promote, 18 to terminate, two to reappoint without tenure, and 13 abstentions. Following this vote, Dean McArthur asked Professor James Heskett, a strong supporter of Ms. Jackson and a member of the Full Committee, to address the Full Committee at its second meeting, and to state the case in favor of plaintiff's appointment.

At the second 1983 meeting of the Full Committee, Professor Heskett addressed the Full Committee as the Dean had requested, and other supporters of Ms. Jackson were afforded the opportunity to address the Full Committee as well. Following the discussion at the second meeting, the Full Committee voted 36 to promote and 31 to terminate, with three abstentions.

If, as plaintiff maintains, her 1983 tenure review was limited to her monograph as measured against the Donaldson standard, it would have been highly unlikely that she would have received majority support for promotion, as she did, from the Full Committee. By plaintiff's own admission, her mono-

graph, in its fall 1983 form, did not meet the Donaldson standard. The fact that she received the extensive support that she did suggests that her tenure review process in 1983 involved consideration of far more than just her inadequate monograph.[17]

3. The 1983 Reasons for Tenure Denial

The 36 votes for promotion which plaintiff received on the second ballot in 1983 constituted majority support. They did not, however, constitute the substantial majority required by Dean McArthur as a condition precedent to recommendation of a candidate for tenure to the President and governing bodies of the University. Accordingly, Dean McArthur did not recommend plaintiff for tenure, thus ending her candidacy.

In a letter written to plaintiff on December 16, 1983, Dean McArthur explained the decision not to recommend plaintiff for tenure as follows:

> I truly regret that it is not possible for me to recommend to the President and the Governing Boards that you be appointed to the rank of full professor with tenure.
>
> . . . As you know, and as stated in the School's "Policies and Procedures for Promotion to Tenure," demonstrated excellence in research and course development is required for appointment to tenure. Your work as reviewed in 1981 was judged not to achieve this standard. The extension of your contract at that time was to provide you with an opportunity to produce conceptual work of the required quality.
>
> In reviewing the results of your research since 1981, most internal and external reviewers and members of the Appointments Committee [Full Committee] agreed that the research and resulting manuscript does not meet our

[17] Also supporting this conclusion is the December 16, 1983 letter from Dean McArthur to plaintiff stating that the Full Committee reviewed plaintiff's "overall record once again." *See generally infra* Sec. IV.E.3.

> standards for demonstrated excellence in research and creative course development. The weight of opinion considered by the Committee was clearly that the work you have completed does not satisfactorily answer the questions many members had about your capacity to do creative conceptual work in Marketing.
>
> In reviewing your overall record once again, including your recent research, the members of the Appointments Committee remain roughly evenly divided in their support of your promotion. On the basis of your record and the substantial opposition to your promotion, I cannot recommend that you be given a tenured appointment at the School. In fact, it would be highly inconsistent with our past practice in promotion cases for me to recommend a tenured appointment when there is not a clear affirmation of support from, at minimum, a large majority of the Committee.

I credit this letter as a good faith and accurate explanation of the reason that plaintiff did not receive a recommendation for tenure in 1983. Plaintiff was denied tenure in 1983 because she had failed to convince a substantial majority of the tenured faculty that she possessed the level of creativity required for tenure at the Business School. Plaintiff's monograph had failed to answer the concerns identified in her 1981 tenure review. A significant percentage of the tenured faculty did not believe that plaintiff's record evidenced a capacity on her part to do creative conceptual work.

The skeptics on the tenured faculty may well have been mistaken with respect to the creative potential of plaintiff's monograph. Plaintiff turned her monograph into an article published in the November-December 1985 issue of the Harvard Business Review, and also used the monograph's materials as the basis for a book on marketing, *Winning and Keeping Industrial Customers: The Dynamics of Customer Relationships*, published in 1985 by Lexington Books. In addition, the

concept of "relationship marketing" which plaintiff discussed in her monograph was cited approvingly by Professor Philip Kotler[18] of Northwestern University in his keynote address to the 50th Anniversary Meeting of the American Marketing Association.[19]

But the existence of differences in opinion regarding the quality of plaintiff's work does not demonstrate gender discrimination. In the five years between her tenure denial in 1983 and the trial in this matter, plaintiff was not able to find a single person who would say that she was denied tenure because she was a woman. In fact, even Ms. Jackson's most ardent supporters have not come forward with a single statement supportive of plaintiff's contention that she was denied tenure because of her gender. For example, Professor Howard Stevenson, a tenured professor at the Business School, an active supporter of Ms. Jackson's candidacy in 1983, a person who testified that the standard against which plaintiff's 1983 monograph was measured was an "impossible" one to meet, and an individual who believes that it is more difficult for women to get tenure at the Business School than for men, testified that he could not identify anything in the Business School's tenure process with respect to Barbara Jackson that indicated sex bias.

F. *Aftermath of 1983 Tenure Decision*

Following her denial of tenure in December 1983, Ms. Jackson requested that her contract, due to expire June 30,

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[18] Professor Kotler is an internationally recognized academic authority on marketing.

[19] Plaintiff suggested in her testimony that she created the concept of "relationship marketing," and that Professor Kotler identified it in his address as her concept and as one of the seven "milestone marketing concepts . . . that have helped to shape the discipline [in the 1980's]." Plaintiff did not, however, introduce into evidence a copy of Professor Kotler's address. Instead, she introduced a newspaper account of the address from the July 31, 1987 issue of Marketing News. That article suggests that Professor Kotler did not identify plaintiff as the creator of the concept of "relationship marketing," but as the person who "highlighted" the concept.

1985, be terminated as of June 30, 1984. Her request was honored, and Ms. Jackson's resignation became effective June 30, 1984.

On April 16, 1984, plaintiff signed a contract with Index Systems, Inc., a business consulting firm based in Cambridge, Massachusetts. Under the terms of the contract, Ms. Jackson agreed to start work with Index at a base salary of $80,000 per year plus bonuses.[20]

On October 19, 1984, Ms. Jackson received a right to sue letter from the Massachusetts Commission Against Discrimination ("MCAD") and the federal Equal Employment Opportunity Commission ("EEOC"). She timely filed her Title VII action in this court on December 24, 1984.

V. FINDINGS REGARDING CIRCUMSTANTIAL EVIDENCE

It is apparent from the discussion in Section IV that there is nothing which might be called direct evidence of gender discrimination in plaintiff's tenure review. In closing argument, counsel for the plaintiff did not point to any particular smoking gun but rather chose to cast plaintiff's proof as an accumulation of circumstantial evidence indirectly establishing discrimination. Alluding to a passage by Cardozo, he argued that "the idea of plaintiff's case . . . is to put together a multitude of little things which add up to an evil to be remedied."[21] This multitude of little things may be classified in three basic categories: (A) a discriminatory environment at the Business School, (B) procedural irregularities in plaintiff's tenure review, and (C) disparate treatment of male tenure candidates.

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[20] When plaintiff resigned from the Business School she was earning an annual salary of approximately $43,000.

[21] *See* B. Cardozo, *A Ministry of Justice*, in *Law and Literature* 41, 52-53 (1931) ("Sometimes the inroads upon justice are subtle and insidious. A spirit or a tendency, revealing itself in a multitude of little things, is the evil to be remedied. No one of its manifestations is enough, when viewed alone, to spur the conscience to revolt. The mischief is the work of a long series of encroachments.").

I do not, however, find that this collection of indirect evidence adds up to any showing of gender-based discrimination against Ms. Jackson in the tenure process.

A. *Environment at the Business School*

The First Circuit has been receptive to the use of circumstantial evidence regarding the overall environment in discrimination cases. The principles were set forth in *Sweeney:*

> Proof of a general atmosphere of discrimination is not the equivalent of proof of discrimination against an individual, but evidence of such an atmosphere may be considered along with any other evidence bearing on motive in deciding whether a Title VII plaintiff has met her burden of showing that the defendants' reasons are pretexts.

604 F.2d at 113. As the Court observed more recently:

> [C]ircumstantial evidence of a discriminatory atmosphere at a plaintiff's place of employment is relevant to the question of motive in considering a discrimination claim. While evidence of a discriminatory atmosphere may not be conclusive proof of discrimination against an individual plaintiff, such evidence does tend to add "color" to the employer's decision-making processes and to the influences behind the actions taken with respect to the individual plaintiff.

Conway v. *Electro Switch Corp.*, 825 F.2d 593, 597 (1st Cir. 1987).

In light of these broad pronouncements, the plaintiff was afforded full scope in developing proof regarding the environment at the Business School.

1. *Opportunities for Women*

a. Female Faculty

The first element of the Business School environment that plaintiff points to is the percentage of tenured female faculty. When Ms. Jackson first came up for tenure in 1981, there was only one tenured woman professor — Regina Herzlinger — on a tenured faculty of approximately 80 persons.[22] And Professor Herzlinger was the second woman in the history of the Business School to have received tenure. At the time of trial — seven years after Barbara Jackson was first reviewed for tenure at the Business School and four years after the current action was commenced — there were still only three tenured women on a tenured faculty of approximately 84.

Those figures, while striking, are not in themselves particularly probative in a disparate treatment case. Nor, as the Supreme Court emphasized at the end of the past term, would such statistics be probative even if this case had been framed in terms of a disparate impact theory. Rejecting an analysis which found a prima facie case of employment discrimination solely on a statistical showing of a high percentage of white workers in a set of higher paying jobs and a low percentage of white workers in less desirable jobs, the Court firmly concluded that a pure proportionality approach "misapprehends

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[22] The plaintiff also makes reference to differential employment conditions which had been the subject of complaint by Professor Herzlinger. Professor Herzlinger complained to Dean McArthur in the early 1980's that women faculty members were paid less than men. However, she testified by stipulation that the Dean convinced her "that the salary differential was attributable not to sex, but to age and years on the job."

Professor Herzlinger also testified that she thought bias was involved in the decision not to let her teach when she first joined the faculty in 1971. However, she cautioned that she could not be sure whether the bias was merely personal or was directed "against women in general." In any event, Professor Herzlinger "does not believe that different criteria are applied to women than to men in the process of reviewing candidates for promotion to tenure at Harvard Business School. Nor does she believe that women candidates for tenure have to meet higher standards than male candidates."

our precedents and the purposes of Title VII." *Wards Cove Packing Co.* v. *Antonio*, ____ U.S. ____, 109 S.Ct. 2115, 2121, 104 L.Ed.2d 733 (1989).

> "There can be no doubt," as there was when a similar mistaken analysis had been undertaken by the courts below in [*Hazelwood School Dist.* v. *United States*, 433 U.S. 299, 308, 97 S.Ct. 2736, 2741-42, 53 L.Ed.2d 768 (1977)], "that the ... comparison ... fundamentally misconceived the role of statistics in employment cases." The "proper comparison [is] between the racial composition of [the at-issue jobs] and the racial composition of the qualified ... population in the relevant labor market." *Ibid.*

Id.

The plaintiff here offered no evidence linking the modest number of female tenured faculty to an analysis of the qualified labor market for Harvard Business School professors. Rather, recognizing that the development of qualifications in such a labor market requires at a minimum a lengthy preparation process which is likely to include graduate education in a Business School, the plaintiff offered evidence concerning admissions to the Business School. However, as I discuss in the next section, the admissions statistics developed at trial were not helpful to plaintiff's case.[83]

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[83] I permitted the plaintiff to adduce admissions evidence despite the fact that at an early stage of this litigation both Magistrate Cohen and Judge Garrity took the position that such evidence was not relevant. Adopting the views of the Magistrate, Judge Garrity concluded that "[t]he selection of students is not an employment practice and is based on considerations wholly different from those used in making employment decisions." *Jackson*, 111 F.R.D. at 474; *cf. Wygant* v. *Jackson Board of Educ.*, 476 U.S. 267, 276, 106 S.Ct. 1842, 1848, 90 L.Ed.2d 260 (1986) (plurality opinion) ("There are numerous explanations for a disparity between the percentage of minority students and the percentage of minority faculty, many of them completely unrelated to discrimination of any kind."). In receiving this evidence, I accepted the plaintiff's theory that a policy of restricting the number of women

b. Female Admissions

The plaintiff's essential contention as to admissions is that the percentage of female applicants admitted to the Business School levelled off at approximately the time her tenure review began. From this the plaintiff sought to argue the inference that Harvard was establishing at the entry level a serious restriction upon female opportunities at the Business School. That analysis is superficial, however, because from 1973 to 1979, the percentage of female applicants roughly doubled — from about 12 per cent to about 26 per cent — whereas from 1979 to the present, the percentage of female applicants has remained fairly constant at 23 to 26 per cent.

As the rate of female applications has levelled off, moreover, the Business School has increased its acceptance rate for women. For example, in 1973, 12 per cent of the applicants were women and 11 per cent of the admissions were women. From 1981 to the present, however, the acceptance rate for women has been slightly higher than the applications rate. In 1983, for example, approximately 24 per cent of applicants, but approximately 25 per cent of admissions, were women. And in every year since 1981 female applicants have been admitted to the Business School at a higher rate than male applicants.

2. Climate and Atmosphere

The plaintiff has referred to a variety of comments and observations by various members of the Business School community as illustrative of a climate or atmosphere of discrimination. A large number of these comments were made well before the plaintiff's tenure review process began and are

admitted to the Business School can be seen as an effort to constrict the pipeline through which women can become part of the qualified labor pool for tenured faculty. The defendants, of course, were afforded the opportunity to rebut this theory with evidence of their own. They did so persuasively.

manifestly too remote from the tenure decision-making process to have any relevance in this action.[24] Similarly remote from the issues in this action is the allegation that when plaintiff started teaching at the Business School in 1973, the door at the Faculty Club labelled "Faculty Coatroom" actually led to the men's restroom.

More pertinent are three sets of comments from members of the Business School administration bearing upon opportunities for women at the Business School. In addressing these remarks, I bear in mind the Supreme Court's recent observation regarding the significance of such commentary. "Remarks at work that are based on sex stereotypes do not inevitably prove that gender played a part in a particular employment decision. The plaintiff must show that the employer actually relied on her gender in making its decision. In making this showing, stereotyped remarks can certainly be *evidence* that gender played a part." *Price Waterhouse*, 109 S.Ct. at 1791 (plurality opinion) (emphasis in original).

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[24] These examples are: (a) a comment made to plaintiff in January 1973 by then Dean Larry Fouraker to the effect that "women were not successful in the HBS classroom"; (b) the fact that in September 1973, on plaintiff's first day as a teacher at the Business School, Professor Harry Hansen of the Marketing Area welcomed a group of approximately 160 MBA students, roughly 11% of whom were women, by calling the students "you men" and telling them to find the "man on the faculty" to whom they were assigned for orientation; (c) Professor Hansen's alleged routine use of a female student to play the role of housewife during in-class simulations in 1973; (d) the fact that during the 1974-75 school year, a male professor at the Business School found it "cute" and rather liked it when a woman who was one of his brightest students giggled while delivering dazzlingly intelligent oral answers in class; (e) insensitivity expressed during the 1975-76 school year by the head of the MBA Program to the problem of bias against women at the Business School; (f) the fact that men on the doctoral admissions committee in 1977-78 initially considered deferring an otherwise qualified female applicant because she happened to have young children and one of the men believed that having children would be a "maturing process for the mother."

a. The Saalfield and McGowan Comments

Anne McDonough worked in the admissions office of the Business School from 1974-1980. From July 1978-July 1980, Ms. McDonough was the Director of Admissions. In her capacity as Director, she was a member of a small committee that made MBA Program admissions decisions.

Ms. McDonough testified that in April 1978, three months before her formal appointment as Director of Admissions, Assistant Business School Dean James Saalfield cautioned her that as Director of Admissions she should not get carried away admitting too many women to the MBA Program, because there were enough women in the program already.

At approximately the same time, Ms. McDonough also had a conversation with Jim McGowan of the Business School's financial office, in which Mr. McGowan stated that a study done regarding fund raising for the Business School indicated that women alumni did not contribute to the school to the same degree as male alumni. Mr. McGowan indicated that this "fact" should be borne in mind in determining whether to admit a large number of women.

At the time these statements were made, neither Dan Saalfield nor Mr. McGowan was in any way involved in MBA Program admissions. Neither had any authority over Ms. McDonough, and neither had any say in the formulation of admissions policies. Moreover, Ms. McDonough took their comments as advice, not definitive instruction, and she stated unequivocally that she ignored the advice. An examination of admissions data during Ms. McDonough's tenure as Admissions Director discloses no basis for concluding that Ms. McDonough or anyone else actually involved with admissions acted on these comments by restricting female admissions.

b. The Donaldson Comment

Gordon Donaldson testified that in his opinion it is more difficult for women to become members of the tenured faculty

than for men. In explaining the basis of his opinion, Dean Donaldson said:

> The basis is, basically, that I believe that in society at large, there's a reluctance to accept women into certain leadership roles in certain areas where they traditionally have not had such roles. I believe that business is one of those areas. And given that that's what seems to be true of the population at large, I have no reason to believe that there isn't some element of that in our student body and among our faculty.

Plaintiff acknowledges that at first blush Dean Donaldson's comment is little more than lumpen sociology, an innocent observation by a sensitive man suggesting that even some at the Harvard Business School rise and fall with the tides of societal attitudes. However, plaintiff contends that the difference between the Donaldson statement and a truly innocent observation is the source. Gordon Donaldson, after all, was the person in charge of managing the appointments review process, including tenure review, during the period of time when Barbara Jackson was considered for tenure. Plaintiff maintains that the Donaldson statement, despite its patina of guilelessness, betrays a failure on the part of the Business School to meet its obligations under Title VII. It appears to be plaintiff's contention that Title VII exists because what society does is wrong; and, therefore, those in managerial or policy-making positions such as Gordon Donaldson are obliged to correct, not reflect, the prejudices of society.

I find, however, that Dean Donaldson's statement, which plaintiff portrays as evidence of discriminatory intent, is merely a recognition that the general culture's stereotypes and prejudices undoubtedly influence, albeit indirectly, the composition of the Harvard Business School student body and faculty. This recognition that Harvard is not insulated from the consequences of more general societal attitudes that continue

to pervade our culture does not signal a violation of Title VII at the Business School.

Disparate treatment analysis is concerned with intentional discrimination, not subconscious attitudes. Dean Donaldson's statement tells us his view of a subconscious characteristic of the Business School. However, immediately after offering that view, he testified that

> the appointments process, as a process — and certainly it's been my goal all the way through my responsibilities to make sure that the process is as free of any kind of deliberate discrimination, other than discrimination on the question of, do they meet the standards for appointment or not — is as free of discrimination as it can be.
>
> In other words, I don't believe that either the standards of the university or of the business school, as stated in the appointments manual, or the process by which a review is undertaken, the process for which I was responsible, could be construed as having more than one standard for whoever the candidate might be.

In his direct trial testimony Dean Donaldson amplified his views:

> I do think that it is more difficult for women to achieve tenure, but not because of the standards to which they are held. I believe that some elements of the business community and of society at large have, unfortunately, been reluctant to accept women in roles of leadership traditionally occupied by men. I cannot assume that the Business School faculty of the academic community generally is wholly immune from such attitudes, but I know of no facts suggesting that anyone on the Full Committee has ever opposed any woman candidate for tenure because of her sex.

I find this testimony wholly credible. Therefore, I conclude that in his capacity as the manager of the Business School's tenure review process during the period relevant to this litigation, Gordon Donaldson met his obligation under Title VII. The race and gender neutral process that he helped establish and maintain may not yet have eliminated "subconscious stereotypes and prejudices" held by some of the Business School's tenured faculty members; however, those subconscious attitudes that may well remain are precisely the sort that disparate treatment analysis cannot and was never designed to police. *Watson*, 108 S.Ct. at 2786-87 (plurality opinion).

c. The McArthur Comment

Plaintiff testified that

> [i]n a conversation in his office in approximately 1980 John McArthur told me that if "they" (the government and/or the public) wanted women on the faculty in larger numbers, they would have to impose quotas because otherwise Harvard would go through the affirmative action procedures but would not actually promote women. I recall that John made that comment after he complained to me that the affirmative action procedures were onerous.

Defendant McArthur does not recall having ever made the quotas comment attributed to him by plaintiff. In fact, he testified that it is not the sort of comment he would ever make, because, especially when viewed through the discriminatory gloss placed upon it by plaintiff, it runs counter to his strongly held beliefs. On the basis of all the evidence, however, I have concluded that it is more likely than not that Dean McArthur made some version of the statement attributed to him by plaintiff.

Nonetheless, I find plaintiff's construction of the comment — as meaning no women would be promoted without government-imposed quotas and that the Business School's own affirmative action procedures were windowdressing[25] — to be strained.

B. *Procedural Irregularities*

1. Stephen Bradley's Placement on 1981 Subcommittee

Professor Stephen Bradley was placed on plaintiff's 1981 Subcommittee over her specific request that he be excluded. Plaintiff maintains that defendants' disregard of her request constitutes evidence of sex discrimination because no similar request by a male candidate was ever disregarded.

Defendants did not introduce any evidence to explain the decision to include Professor Bradley on plaintiff's 1981 Subcommittee. However, in answer to a question I asked during closing argument, defendants' counsel asserted that plaintiff's request to exclude Bradley had been rejected because: (1)

[25] The Business School, in fact, maintained an affirmative action program designed to identify potential minority and female candidates who could be considered for the tenure position under consideration. For example, Barbara Jackson's 1981 Subcommittee Report, in a section denominated "Outside Comparisons and Affirmative Action," states:

> The ten outside reviewers were also queried regarding other possible candidates with special reference to minorities and women. Finally, we solicited from the Area and generated from within the Subcommittee a list of other individuals against whom we might calibrate Jackson's relative strengths and accomplishments. Twenty-five people were identified as relevant comparisons in Marketing. None of these were minority group members and only one was a woman. . . . After considering those people, the Subcommittee concluded: There is no member of a minority group, or another woman, whose interest[,] qualities and accomplishments are superior to Jacksons [sic]; individuals of similar ability and accomplishment, . . . , would, if candidates for a position at HBS, be complements to Jackson rather than substitutes.

plaintiff had made an inordinate number of exclusion requests,[26] thereby severely reducing the pool of professors who were both available and competent to evaluate plaintiff's portfolio; (2) the ground for plaintiff's request was regarded as meritless;[27] and (3) Professor Bradley was especially qualified to evaluate plaintiff's work.

These post-hoc explanations by defendants' counsel for the decision to include Bradley may be correct. There is, for instance, evidence in the case which suggests that plaintiffs' reasons for suspecting Professor Bradley of gender bias were rather thin.[28] Moreover, it is true, as defendants contend, that no tenure candidates at the Business School have veto power over appointments to their Subcommittees. These facts, however, do not explain why plaintiff's request to exclude Bradley was not accorded the same deference apparently afforded similar exclusionary requests by male candidates. Thus, I find that in at least this circumstance, plaintiff was treated differently from male tenure candidates.

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[26] Plaintiff requested that four persons be excluded from her Subcommittee.

[27] Plaintiff requested that Bradley be excluded because of alleged bias against women. In defendants' estimation, her evidence for this allegation was weak to the point of being non-existent.

[28] Ms. Jackson's grounds for requesting that Dean Donaldson exclude Professor Bradley were communicated to Dean Donaldson as "the story that Sandy Skiba had related to me about Steve Bradley." That story as recounted by Ms. Jackson was as follows:

> One day late in the 1976-1977 year, a student named Sandy Skiba came to my office. I had taught her ME in the MBA program. She subsequently became a doctoral student. She came to tell me that she was very upset because of what Steve Bradley had said in a doctoral class. She reported that in teaching a case on EEO, timetables and such Steve had said that HBS was in trouble about EEO and women. She reported that he had said that there were not qualified women that the school could put on the tenure track. She said he continued that therefore the only way for HBS to have senior women was to promote women who were not really qualified. Sandy told me she was especially upset because Steve had made those remarks to the DBA students, a traditionally very important source of new HBS faculty.

This disparate treatment does not, however, constitute evidence of discrimination in plaintiff's tenure decision. Plaintiff had no reason based on personal experience to suspect Professor Bradley of gender bias. At most, plaintiff raises the possibility of *personal* bias. Because plaintiff was on the tenure track at the time of Professor Bradley's alleged comment, a fair inference would be that he did not in 1977 consider *her* sufficiently qualified. In any event, plaintiff's impression, and hence her request, was based on hearsay information. That information was hardly overwhelming or unambiguous. In addition, it is undisputed that Professor Bradley was a competent judge of plaintiff's scholarship.

Furthermore, although Professor Bradley voted in the Subcommittee that plaintiff had not met the Business School's tenure standards, he also voted that she should, nevertheless, receive tenure. It was not Professor Bradley's negative vote that was seized upon by those members of the Full Committee who ultimately voted against plaintiff's candidacy in 1981; it appears to have been pervasive doubt about plaintiff's creativity that caused the 1981 rejection. Accordingly, I find that whatever caused Dean McArthur to reject plaintiff's request to exclude Professor Bradley from plaintiff's 1981 Subcommittee, it was not gender bias and it played at most a *de minimus* role in the ultimate decision not to offer plaintiff tenure in 1981.

2. Affirmative Action Question to Positive Reviewer

The most enthusiastic 1981 outside reviewer of plaintiff's written work was asked whether affirmative action considerations had played any role in his review. No similar question was asked of plaintiff's least enthusiastic reviewer or of any reviewer of any work by a male tenure candidate.

Like the selection of Stephen Bradley to serve on plaintiff's 1981 Subcommittee, this is an example of disparate treatment without substantial bearing on the ultimate factual issue in

this case, i.e., whether defendants intentionally discriminated against plaintiff in denying her tenure. The asking of the affirmative action question in this case did not disadvantage plaintiff, because the reviewer answered that affirmative action had played no conscious part in his evaluation of Ms. Jackson, and that he doubted it had played even a subconscious role. Having received this answer, the Subcommittee appears to have dropped the issue; indeed, in the eyes of the Subcommittee, the credibility of Ms. Jackson's most positive evaluator seems to have been enhanced by his response to the affirmative action question. Those who interviewed him "were unanimous in concluding that the interview not only permits one to take [his evaluation] at face value but, indeed, [his] position is somewhat more positive than the letter states."

Nonetheless, the question is worth noting. The enthusiastic reviewers of the work of male candidates are apparently not asked whether their enthusiasm is an effort to compensate for disadvantages faced by white male tenure candidates in an academic world overly concerned with affirmative action. And Ms. Jackson's most critical evaluator, interviewed face-to-face by the Subcommittee, was not asked whether any animosity toward women, or toward affirmative action, played any role in the negative evaluation. Although the Subcommittee's question, if asked across the board of all outside evaluators, would have been appropriate, the fact that it was not asked across the board makes its appearance in Ms. Jackson's Subcommittee Report somewhat peculiar and unsettling. This is especially true in view of the fact that Dean McArthur testified that the question was improper.

The asking of this question, however, does not prove that the Business School sought to write off or discount favorable views of Jackson's work. This would certainly be a different case if the reviewer had stated that his support for affirmative action had possibly played a slight role in his support of Jackson, and defendants' response had been to discredit his evaluation totally. Here the Business School did nothing of the sort.

The fact that the question was asked is thus only marginally significant as circumstantial evidence of gender bias.[29]

3. Discussion of Plaintiff's Personality

Plaintiff maintains that during the Full Committee consideration of her candidacy in 1981 and 1983 there was much more discussion of personality than when male candidates came before the Full Committee. She contends that this demonstrates that the Full Committee deliberations over her candidacy were infected by illicit gender-based considerations.

Plaintiff's evidence in support of her contention consists solely of a statement by Professor Regina Herzlinger, the only woman to participate in the Full Committee considerations of plaintiff's candidacy, that "[i]n the discussions of Barbara Jackson's candidacy for tenure, [Professor Herzlinger] perceived that there was much more discussion of personality than in the usual case." However, Professor Herzlinger stated that she "took note of the discussion of Jackson's personality [because she] is herself a woman and was therefore sensitive to

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[29] It bears noting that this question to Ms. Jackson's most enthusiastic supporter is of a piece with other comments raised by plaintiff as indicative of gender bias at the Business School. At issue here is the difficulty of discussing issues such as affirmative action without running the risk of being misconstrued. The issue of affirmative action is a highly charged one as to which clumsy, off-hand, or tentative formulations may be taken as signs of gender bias. That is the construction, for example, that plaintiff places on the Donaldson, *see supra* Section V.A.2.b., McArthur, *see supra* Section V.A.2.c., and Bradley, *see supra* Section V.B.1., observations. But unless courts are to create an incentive structure for only Bowdlerized discussions of the topic, the commentary must be read in context with sensitivity to the fact that reservations about — indeed, even opposition to — affirmative action as a public policy are not necessarily evidence of gender bias in a particular case involving the individual qualifications of a person whose group would be advanced by affirmative action. Nevertheless, whenever such comments — even if stray or ambiguously formulated — are made part of the evidence in a discrimination case, they must be carefully considered. Each of the comments here was troubling to some degree. But after cautious reflection, I find that neither alone nor together do the comments provide any material evidence of gender bias in this case.

the discussion of Jackson's personality . . . [and not because of] the relative amount of time given to it." Moreover, as noted above, Professor Herzlinger "does not believe that different criteria are applied to women than to men in the process of reviewing candidates for promotion to tenure at Harvard Business School. Nor does [Professor Herzlinger] believe that women candidates for tenure have to meet higher standards than male candidates."

If plaintiff were correct that discussion of personality was more prominently featured during the Full Committee's deliberations over her candidacy than during the deliberations over male candidacies, that fact would constitute evidence of sex discrimination. *Cf. Price Waterhouse*, 109 S.Ct. at 1790-91 (plurality opinion). Here, however, plaintiff has not produced any evidence in support of her contention. Professor Herzlinger's testimony, taken as a whole, makes it clear that even she does not consider whatever sex stereotyping may have been involved in the discussion of Ms. Jackson's personality to evidence, even subtly or indirectly, gender-biased disparate treatment in plaintiff's review.

C. *Disparate Treatment of Male Candidates*

1. Disparate Application of "Creativity" Requirement

The nondiscriminatory reason articulated by defendants for denying plaintiff tenure in 1981 (and 1983) concerned her perceived lack of sufficient creativity.

I have found, as a factual matter, *see supra* Section IV.C.2., that there was no material difference between the creativity requirement under the 1977 and 1981 Standards, and that plaintiff was effectively evaluated under the 1977 Standards in her 1981 evaluation.

Plaintiff maintains that under the 1977 Standards she met the creativity requirement, as evidenced by her 1981 Subcom-

mittee Report. Consequently, she claims, defendants' articulation of her alleged lack of creativity as the reason she was denied tenure was clearly pretextual. In addition, she maintains that a comparison of her creativity evaluation with those of successful male candidates under both the 1977 and 1981 Standards[30] demonstrates that she was held to a higher standard, and thus that defendants' articulated reason for her tenure denial was a pretext for sex discrimination. *See Sweeney*, 604 F.2d at 114 ("One familiar aspect of sex discrimination is the practice, whether conscious or unconscious, of subjecting women to higher standards of evaluation than are applied to their male counterparts.").

I will analyze plaintiff's contentions in sequence by addressing: (a) whether she met the creativity requirement under the 1977 Standards; and (b) whether she was held to a higher standard of creativity than were successful male candidates.

a. Creativity Under 1977 Standards

Under the 1977 Standards, "excellence in course development" and "creative course development" are essentially the same phenomenon. *See* 1977 Standards ¶ 9. Plaintiff acknowledges that to obtain tenure under the 1977 Standards, a candidate who had not demonstrated excellence in research would have had to demonstrate excellence in creative course development. She maintains that under the 1977 Standards excellence in creative course development could be demonstrated in any one of three ways. The 1977 Standards, in subparagraph 2 of paragraph 9 [hereinafter "paragraph 9"], provide:

> Excellence in [creative] course development can be demonstrated in at least one of the following respects: (a)

[30] My finding of fact that as applied to this case there were no material differences between the 1977 and 1981 Standards, and my conclusion that in 1981 plaintiff was effectively evaluated under the 1977 Standards, indicate the appropriateness of comparing plaintiff's 1981 evaluation with those of males who received tenure under the 1977 Standards.

> development of new concepts, (b) application of concepts already known in one field to a quite different field, (c) development of pedagogical approaches which greatly increase the ability of students of management to make use of the relevant parts of subjects previously taught in other ways for other purposes.

Plaintiff acknowledges that her work was not sufficient as of December 1981 to demonstrate excellence under either the 9(a) or 9(b) test. However, she maintains that her work, especially her book, *Computer Models in Management*, met the 9(c) requirement.

Plaintiff claims that *Computer Models in Management* was, as of December 1981, her "key work" showing excellence in course development. She concedes that it did not contain "new ideas," but asserts that it was "pedagogically creative" and thereby met the creativity requirement of the 1977 Standards as embodied in paragraph 9(c). The 1981 Subcommittee agreed. It concluded that "[h]er materials demonstrate pedagogical creativity, rather than creating new concepts," and that "putting heavy stress on . . . pedagogical creativity . . .[,] her *Computer Models in Management* course . . . met . . . [the] standard of creative course development." 1981 Subcommittee Report at 28. Indeed, despite defendants' protestations to the contrary, it is impossible to read the 1981 Subcommittee Report and conclude that the finding of "pedagogical creativity" was not the equivalent of a finding that plaintiff had met the 9(c) definition of creativity, at least with respect to *Computer Models in Management*. Accordingly, plaintiff maintains that if one applies the 1977 Standards, the 1981 Subcommittee Report belies defendants' articulated reason for denying her tenure in 1981. I disagree.

The issue here is not whether reasonable persons found or could have found plaintiff to have been creative under the 1977 Standards — it is obvious that three members of the 1981 Subcommittee found her to be adequately creative and equally

obvious that other persons could have reasonably concurred with this assessment. The question is whether a substantial portion of the 1981 Full Committee could have legitimately concluded, on the basis of a fair reading of the 1977 Standards and plaintiff's 1981 Subcommittee Report, that plaintiff had not satisfied the creative course development requisite as of December 1981. The answer to this latter query is yes.

The 1977 Standards state that creative course development may be demonstrated in any one of the three respects listed in paragraph 9. However, paragraph 9 also states that a tenure "candidate must demonstrate convincingly both powers of conceptualization through course design and materials." This statement may be fairly construed as making first among equals the 9(a) "development of new concepts" method of demonstrating creative course development. At least, it suggests that "mere" pedagogical creativity, i.e., the fulfillment of the 9(c) method, may not in all instances be sufficient to satisfy the 1977 Standard's creative course development requirement. Indeed, this construction of the 1977 Standards is supported by the 1981 Subcommittee's conclusion regarding plaintiff's creativity:

> [Three members of the Subcommittee] putting heavy stress on the pedagogical creativity noted by [several reviewers] and the high quality of the instructor's manual noted by [other reviewers] — consider her *Computer Models in Management* course to meet, by a narrow margin, our standard of creative course development. [The fourth member] considers her work to narrowly fall short of creative course development. [He] does consider her book, *Computer Models in Management*, to be "very good or even excellent but not conceptually creative."

1981 Subcommittee Report at 28. In other words, the three members of the Committee who believed *Computer Models in Management* had enabled plaintiff to meet the creative course

development standard did not regard "pedagogical creativity" standing alone to be sufficient to meet the standard; and the fourth member obviously regarded the development of new concepts as the core of creative course development. No one on the Subcommittee appears to have read paragraph 9 of the 1977 Standards in the manner of plaintiff, i.e., as presenting three equal alternative methods of achieving creative course development.

However, even if one were to read paragraph 9 in the fashion suggested by plaintiff, it would still be reasonable to conclude that plaintiff did not meet the creative course development requirement. For even if "pedagogical creativity" had been sufficient to satisfy the requirement, the Subcommittee did not so much find that plaintiff's overall work was "pedagogically creative" as that one element of her portfolio, namely the work on *Computer Models in Management*, was pedagogically creative.

> Given Jackson's expressed desire [in 1981] to be a part of the Marketing Area in the future, one of the key questions for the Subcommittee and Full Committee [was] whether the record of teaching, creative course development, and outstanding course maintenance in ME when combined with the work in Marketing to date permit[ted] an adequately confident judgment that Jackson w[ould] soon reach in Marketing the level of achievement she reached in ME.

1981 Subcommittee Report at 41. A substantial number of members of the Full Committee could have reasonably concluded that she would not.

Plaintiff herself concedes that as of December 1981 she had not achieved creative course development in Marketing. In light of this, and of the Subcommittee's conclusion that she had achieved only pedagogical creativity in *Computer Models in Management*, members of the Full Committee could rea-

sonably have concluded that her work in *Computer Models in Management* did not provide an adequate basis from which to predict her future creativity. Though three of the four members of the 1981 Subcommittee came to a different conclusion, fair-minded members of the Full Committee could, and apparently did, disagree with these three.[31]

The reasonableness of the conclusion drawn by a substantial number of members of the Full Committee — that plaintiff had not satisfied the creative course development standard — is supported by numerous critical comments regarding plaintiff's creativity that pock mark her Subcommittee Report. Although the members of the 1981 Subcommittee voted 3-1 that plaintiff had met the Standards and 4-0 that she should receive tenure, the Subcommittee's Report, when read in its entirety, evidences serious doubts even among members of the Subcommittee concerning plaintiff's creativity. Those doubts were apparently the basis upon which a critical mass of tenured faculty members voted against her tenure application. Applying the 1977 Standards, reasonable faculty members, acting in good faith, could have found that plaintiff had not satisfied the creative course development requirement for tenure. Thus, I find that defendants' articulated reason for denying plaintiff tenure in 1981 was a legitimate reason.

This finding, of course, does not end the inquiry. A legitimate nondiscriminatory reason for the denial of tenure may, nevertheless, be a pretext for sex discrimination. If, as plaintiff maintains, defendants treated men more favorably than women in the application of the 1977 creative course development requirement, that would be evidence of sex discrimination. If, for instance, successful male non-researcher tenure candidates received Subcommittee evaluations of their creative course development so much worse than plaintiff's that reasonable members of the Full Committee could not, in good faith, have concluded that the creativity standard had been

[31] It should be remembered that in the Business School's tenure review process, Subcommittee Reports play a purely advisory role. The recommendations of the Subcommittee are not dispositive.

met, that would constitute evidence of sex discrimination. *See Sweeney*, 604 F.2d at 114.

b. Creativity of Male Candidates

Plaintiff maintains that in at least eleven cases,[32] defendants held successful male candidates to a substantially lower creative course development standard than the one to which she was held.[33]

In each of the instances highlighted by plaintiff, the Subcommittee evaluations regarding the creative course development requirement were more or less equivocal. However, in no instance were the evaluations such that members of the Full Committee could not have read them and reasonably, in good

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[32] Plaintiff contends that but for defendants' destruction of relevant tenure records, *see supra* Section III.A.2., she would have been able to point to numerous other examples of disparate application of the creative course development requirement.

[33] *See* Plaintiff's Exhibit A, the Subcommittee Report for Candidate 77-2, at 18-23 and 34 (not much creativity in new ways of teaching; controversy regarding creative course development; but candidate is evaluated as "outstanding and creative"); Plaintiff's Exhibit B, the Subcommittee Report for Candidate 77-3, at 33-34 (course work not creative); Plaintiff's Exhibit C, the Subcommittee Report for Candidate 77-4, at 12-15 (found creative because he combines and applies concepts in a new way); Plaintiff's Exhibit D, the Subcommittee Report for Candidate 80-1, at 16 (found creative despite no explicit finding that he created new concepts); Plaintiff's Exhibit E, the Subcommittee Report for Candidate 80-2, at 44, 50, and 56 (found creative despite no explicit finding that he created new concepts); Plaintiff's Exhibit 35, the Subcommittee Report for Candidate 81-3, at 20-21 (world class researcher, but new ground was broken methodologically, not substantively); Plaintiff's Exhibit 36, the Subcommittee Report for Candidate 83-1, at 37 (provided fine critique of existing paradigm, but did not provide an alternative); Plaintiff's Exhibit F, the Subcommittee Report for Candidate 84-2, at 18 (outstanding in course development but no "conceptual breakthrough"); Plaintiff's Exhibit G, the Subcommittee Report for Candidate 84-5, at 23-26 (creative in course development, but no "strikingly new principles, tools, or concepts"); Plaintiff's Exhibit H, the Subcommittee Report for Candidate 84-6, at 4-11 (found creative despite strength in creating new cases rather than new concepts); and Plaintiff's Exhibit 1, the Subcommittee Report for Candidate 84-7, at 19-23 and 35 (no specific conclusion regarding creativity).

faith, concluded that the candidates had met the creative course development requirement.

For instance, plaintiff asserts that in 1981 she satisfied her Subcommittee that she was pedagogically creative but was nevertheless denied tenure because she had not demonstrated the ability to develop new concepts, whereas candidates 80-1 and 80-2 received tenure despite the fact that their Subcommittees did not explicitly find that they had developed new concepts. Even if plaintiff's contention is accurate, however, she has not shown disparate treatment. The respective Subcommittees applied the same standards and came to similar conclusions regarding plaintiff and candidates 80-1 and 80-2. The Subcommittee Reports and recommendations do not, however, carry dispositive weight before the Full Committee. Plaintiff's Subcommittee Report was one from which the Full Committee could, and did, conclude that plaintiff had not met the creative course development requirement. The Subcommittee Reports of 80-1 and 80-2 were ones from which the Full Committee could, and did, conclude that these two candidates were sufficiently creative to merit tenure. The fact that the Full Committee came to opposite conclusions about the candidacies of plaintiff on the one hand and 80-1 and 80-2 on the other — or the possibility that I myself might have come to a different conclusion if I had been on the Full Committee — is irrelevant. All that matters is that in each instance the Full Committee acted reasonably and in good faith, without an illicit motive. *See Kumar*, 774 F.2d at 12 (Campbell, C.J., concurring). There is no indication here that it acted otherwise.

2. Disparate Application of the 1981 Excellence Standard

Plaintiff maintains that in 1981 she had to demonstrate excellence in both creative course development and research, whereas certain successful males who were evaluated under

the 1977 Standards only had to demonstrate excellence in one or the other.[34] Furthermore, plaintiff contends that even after the 1981 Standards were implemented, and all candidates theoretically had to demonstrate excellence in both creative course development *and* research, certain successful males demonstrated excellence in just one or the other.[35] Plaintiff maintains that the difference between the application of the excellence standard to her and to certain successful male candidates constitutes evidence of disparate treatment. Plaintiff's contentions are misplaced.

First, despite plaintiff's protestations of unfair treatment in 1981, she was formally evaluated under precisely the same Standards as all male candidates in 1981. All candidates who submitted their portfolios in 1981 had prepared for evaluation under the 1977 Standards, but were formally — and according to plaintiff, unfairly — evaluated under the revised 1981 Standards.

Second, even though the 1981 Standards formally applied to plaintiff's 1981 evaluation, plaintiff was effectively evaluated under the 1977 Standards. *See supra* Section IV.C.2. Plaintiff was not required to demonstrate excellence in both creative course development and research, but merely in creative course development. Thus, the excellence standard applied to plaintiff in 1981 was the same as that applied to all the male candidates she contends received favored treatment, with the exception of one, Candidate 77-3. With this one exception, discussed *infra* in Section V.C.4., each of the males who was

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[34] *See* Plaintiff's Exhibit A, the Subcommittee Report for Candidate 77-2, at 12, 17-18, and 38; Plaintiff's Exhibit B, the Subcommittee Report for Candidate 77-3, at 1 and 33; Plaintiff's Exhibit C, the Subcommittee Report for Candidate 77-4, at 7-8 and 19-20; Plaintiff's Exhibit D, the Subcommittee Report for Candidate 80-1, at 2; and Plaintiff's Exhibit E, the Subcommittee Report for Candidate 80-2, at 36-37 and 73.

[35] *See* Plaintiff's Exhibit 35, the Subcommittee Report for Candidate 81-3, at 13 and 21; Plaintiff's Exhibit F, the Subcommittee Report for Candidate 84-2, at 2-3 and 39; Plaintiff's Exhibit G, the Subcommittee Report for Candidate 84-5, at 1; and Plaintiff's Exhibit I, the Subcommittee Report for Candidate 84-7, at 12-19.

successfully evaluated under the 1977 Standards had to demonstrate excellence in either creative course development or research, just like plaintiff.

Third, I have previously found that the 1981 Standards were not materially different from the 1977 Standards. *See supra* Section IV.C.2. The examples plaintiff emphasizes to show disparate application of the 1981 Standards — Candidates 84-2, 84-5, and 84-7 — are simply instances in which the Standing Subcommittee, acting pursuant to paragraph 5(b) of the 1981 Standards, "mix[ed]" the creative course development and research requirements to the point where one was emphasized far more heavily than the other. Indeed, many members of the Full Committee apparently "mixed" these requirements in precisely the same fashion for plaintiff in 1983, as evidenced by the majority support plaintiff received from the Full Committee despite what she concedes was a failure to meet the research requirement.

Accordingly, I conclude that the comparison urged by plaintiff, between her evaluations under the excellence standard and those of certain successful male candidates, does not provide evidence of defendants' alleged intentional gender-based discrimination.

3. Successful Males Without Unanimous Subcommittee Recommendations

Plaintiff's 1981 Subcommittee voted 4-0 to recommend that she receive tenure. Indeed, plaintiff's Subcommittee Report was one on the basis of which Dean Donaldson, the person in charge of the promotions process, believed tenure would be granted. The Subcommittee of at least one male tenure candidate, 81-1, split 2-2 on whether to recommend tenure. Nevertheless, candidate 81-1 received tenure. Plaintiff maintains that this disparity is evidence of gender discrimination. She adds that there is no evidence that any candidate for tenure at the Business School other than herself ever received

a unanimous recommendation for tenure without ultimately receiving tenure.

I find that comparative Subcommittee recommendations in and of themselves do not constitute evidence of gender discrimination. The Full Committee does not vote the Subcommittee's *Report* up or down. It votes on the individual *candidate*, giving the Subcommittee recommendations whatever weight each voter thinks appropriate. The fact that plaintiff received a 4-0 recommendation for tenure from the members of her Subcommittee assured little more than that she would likely receive at least four votes before the Full Committee.

The fact that Dean Donaldson believed on the basis of her Subcommittee Report that plaintiff would receive tenure is interesting, especially in view of Dean Donaldson's role in the tenure review process. However, the mere fact that the Dean was mistaken does not constitute what plaintiff terms "clear evidence" of sex discrimination. The fact that he was wrong in this prognostication adds nothing to plaintiff's case.

On the basis of the evidence before me, plaintiff appears to be correct in her contention that she is the only Business School tenure candidate who ever received a unanimous Subcommittee tenure recommendation without *ultimately* receiving tenure. However, at least one other candidate, 81-1, received a unanimous Subcommittee tenure recommendation without *immediately* receiving tenure.

Candidate 81-1 received an extended tenure review analogous to that received by plaintiff. During the 1978-79 school year, he came up for tenure for the first time and his

> subcommittee . . . reviewed the evidence and and [sic] was unanimous in recommending promotion. The report was read to the full committee on January 11, 1979, when its recommendation was endorsed by a large majority of those in attendance. After further discussion in the marathon Saturday meeting that followed, the size of that majority diminished and the Dean chose not to rec-

> ommend promotion, offering instead an extension of [81-1]'s appointment [with] the possibility of another review by the Appointments Committee.

Plaintiff's Exhibit 34, the Subcommittee Report for Candidate 81-1, at 2-3. In other words, the tenure process of 81-1 and plaintiff followed precisely the same path with the exception that the second time around, 81-1 received a 2-2 Subcommittee recommendation and sufficient support from the Full Committee to receive tenure, whereas plaintiff received a unanimous Subcommittee recommendation *against* tenure and failed to receive sufficient support from the Full Committee. The evidence with regard to the votes on candidate 81-1 does not aid plaintiff's claim of disparate treatment, but rather constitutes evidence that Subcommittee votes do not play anything approaching a dispositive significant role in the Full Committee deliberations,[36] and that plaintiff and 81-1 received remarkably similar treatment.

4. Lowering of Standards for Males

Plaintiff applied a strict interpretation of the 1981 Standards to her candidacy, defendants lowered the standards to enable at least two male candidates, 77-3 and 84-8, to obtain tenure. Plaintiff's evidence in support of this contention consists of the fact that she was denied tenure in 1981 despite the fact that three of the four members of her 1981 Subcommittee voted that she had met the Standards, whereas candidate 77-3 received tenure despite a Subcommittee vote of 4-0 that he had not met the standards, and candidate 84-8 received tenure after his Subcommittee explicitly decided to weigh "the vari-

[36] It bears noting that even a substantial majority vote of the Full Committee is not always sufficient to induce Dean McArthur to make a tenure recommendation. In 1983, for example, plaintiff received support from 54% of the tenured faculty members present and voting at the meeting of the Full Committee. That year, Dean McArthur declined to recommend tenure for a male candidate who received the support of 73% of the tenured faculty.

ous parts of [84-8's] work . . . somewhat different[ly] from the pattern of weighting suggested in the School's 'Policies and Procedures . . .' for the majority of tenure recommendations." Plaintiff's Exhibit J, the Subcommittee Report for Candidate 84-8, at 2.[37]

The Subcommittee for candidates 77-3 and 84-8 expressly modified the Business School's specific published Standards in order to recommend that these two individuals receive tenure. However, in both instances the Standards were overlooked not in an effort to favor males or disfavor females, but for sound educational reasons. These were two exceptional candidates whom the Business School did not want to lose by blindly adhering to the narrowest and strictest conceivable construction of the specific provisions of the published Standards.

Candidate 77-3's Subcommittee recommended him unanimously for tenure as an exception to the Standards because the Subcommittee members found that 77-3 was "a true 'superstar' in the classroom . . . [a] status . . . not achieved by pure showmanship, but by careful, systematic planning[,] and . . . accompanied by real learning." Plaintiff's Exhibit B, the Subcommittee Report for Candidate 77-3, at 33. In addition, 77-3's Subcommittee found it impossible to "ignore the testimony of so many colleagues about the creativity that [77-3] displays in face-to-face discussions." *Id.* at 34. And despite the fact that the Subcommittee found 77-3 "*not* careful, or orderly, or precise," it found that "he is not only willing to take intellectual risks, he apparently enjoys doing so," *Id.* 77-3's Subcommittee concluded that

> [w]hen we try to weight these various "dimensions of mental quality" and arrive at an overall score, we arrive at the conclusion that the School will be better off with

[37] I note that plaintiff herself received a unanimous recommendation of promotion from her 1981 Subcommittee because one member of the Subcommittee voted that she should be promoted as an "exception" to the Business School's normal standards.

> [77-3] over the next 30 years than without him. Hence, our recommendation.

Id.

With reference to 84-8, the Subcommittee acknowledged that while his published written work was not then at the level required by the standards, they recommended him for tenure by placing

> special weight on the candidate's combination of: (1) Intellectual leadership in identifying key managerial issues related to the changing field of . . .; (2) His capturing these issues in rich cases; (3) His great skill in presenting this material to a variety of students, including senior managers in . . . field, and (4) His emerging skill in presenting these field-based insights in articles. In the first of these three skills [84-8] is not only extremely able, there is no equal in the peer group to replace him. These activities are important in this School's leadership in teaching of executives and MBA students.

84-8's Subcommittee Report at 41. I do not find that defendants' willingness to make adjustments for two male candidates because of certain unique (i.e. nonstandardizable) qualities that each possessed, combined with their unwillingness to make an exception for plaintiff, is somehow evidence of defendants' intent to discriminate against plaintiff because of her sex. Institutions such as the Business School must be free to grant tenure to exceptional persons whose work cannot be standardized and who happen to be males, without having to worry that they have created evidence for someone else's Title VII case.

In passing Title VII, Congress did not intend to hamstring academic institutions in the way plaintiff implicitly recommends. The vitality of academic institutions would be severely hampered if colleges and universities, in an effort to stave off

Title VII suits, stopped taking chances on those exceptional persons who do not qualify under some standardized mold, but whom the university decision makers instinctually recognize as possessing a sort of greatness. *See Kumar*, 774 F.2d at 11 (Wyzanski, D.J.) (The "very badge of excellence in the selector" [of candidates for tenure] is the ability to "[d]isregard[ ] the . . . conventionally-qualified" in favor of the distinguished candidate.).

5. Failure to Consider Plaintiff's Entire Record in 1981

Plaintiff maintains that her 1981 Subcommittee did not accord proper weight to her work in ME, but primarily evaluated her work in Marketing, a field in which she had not had an adequate opportunity to develop a record of accomplishment. Plaintiff alleges that successful male candidate 84-5, *see* Plaintiff's Exhibit G, the Subcommittee Report for Candidate 84-5, also changed areas of concentration, but was afforded very different treatment by his Subcommittee. She contends that unlike her Subcommittee, 84-5's Subcommittee was sensitive to the fact that 84-5 had changed areas, and took pains to acknowledge that he was not yet well known in his new field.[38]

As indicated above, *see supra* Section IV.C.4., plaintiff's entire record was taken into account during the course of her 1981 tenure evaluation.[39] Plaintiff's 1981 Subcommittee was

[38] *See, e.g.*, 84-5's Subcommittee Report at 4 ("As indicated by both his assignments and his publication list, [84-5]'s professional accomplishments have been divided between . . . and. . . . In view of this, the Subcommittee believes that we must take into account his work in both areas in arriving at conclusions about his overall performance and his 'quality of mind.' Consequently, we have considered his entire record, and solicited reviews from qualified authorities in both fields, in the course of our deliberations.").

[39] *See, e.g.*, Plaintiff's 1981 Subcommittee Report at 5 ("Two years in Marketing, learning the Area, is an inadequate time to demonstrate excellence within Marketing. Hence, prediction of performance in Marketing based on the ME experience is required. Reasonable judgment can be made

just as sensitive to the difficulties resulting from a change of areas as was 84-5's Subcommittee. No disparate treatment is evidenced by a comparison of Plaintiff's 1981 tenure review and 84-5's tenure review.

6. Failure to Consider Plaintiff's Entire Record in 1983

Plaintiff maintains that whereas her 1983 Subcommittee limited its review to her monograph, successful male candidate 81-1,[40] who like plaintiff received an "extended" tenure review, had his entire record reviewed when he came up for tenure for the second time.

As indicated above, *see supra* Section IV.E.2., plaintiff's entire career, not just her monograph, was taken into consideration in the ultimate decision regarding her candidacy in 1983. Plaintiff's 1983 Subcommittee focused on her monograph, but even in this sense her review was not different from that of 81-1, whose Subcommittee stated:

> This subcommittee has not endeavored to review the entirety of [81-1]'s career; we have taken as our starting point the evidence and findings of the 1979 review and have concentrated our attention on the following: [a list of 81-1's post-1979 work follows].

81-1's Subcommittee Report at 3. Disparate treatment is not evidenced by a comparison of the extended tenure reviews of plaintiff and 81-1.

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but the level of confidence is naturally less than it would be, given more evidence. Although difficult, your Subcommittee believes that there is an adequate informational basis on which to make a fair and informed judgment.").

[40] *See* Plaintiff's Exhibit 34, the Subcommittee Report for Candidate 81-1.

7. Less Qualified Males Have Received Tenure

Plaintiff maintains that in the estimation of members of the tenured Business School faculty, plaintiff was more qualified to receive tenure than many males who actually received tenure. In fact, Professor Stevenson, a tenured Business School professor, testified that in his opinion plaintiff was more deserving of tenure than certain tenured males.

It may well be the case that plaintiff is more qualified than tenured males. However, whether or not that is the case is irrelevant in this Title VII action. "[T]he issue is not whether [plaintiff] was qualified for promotion. . . . The recommendation of the [Dean] is entitled to stand even if it appears to have been misguided, unless it was sex biased." *Sweeney*, 604 F.2d at 112. Pronouncements by plaintiff and her supporters that she was qualified for tenure, even more qualified than tenured males, may be true, but they do not constitute evidence of sex bias.

VI. CONCLUSION

For reasons set forth above, I find that plaintiff has failed to prove directly, circumstantially, or by a combination of both that the decision to deny her tenure at the Harvard Business School was affected in any fashion by gender discrimination. The decision was the result of a determination by a significant portion of the tenured faculty that Ms. Jackson lacked sufficient qualities of creativity to justify extending a tenured appointment to her. That decision was one on which reasonable persons could and did disagree. But it was not a decision which turned to any degree on the plaintiff's gender.

Accordingly, the clerk is directed to enter judgment for the defendants.

SUBCHAPTER VI—EQUAL EMPLOYMENT OPPORTUNITIES

SUBCHAPTER REFERRED TO IN OTHER SECTIONS

This subchapter is referred to in sections 2000h, 5841 of this title; title 43 section 1863.

§ 2000e. Definitions

For the purposes of this subchapter—

(a) The term "person" includes one or more individuals, governments, governmental agencies, political subdivisions, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under title 11, or receivers.

(b) The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include, (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of title 5), or (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of title 26, except that during the first year after March 24, 1972, persons having fewer than twenty-five employees (and their agents) shall not be considered employers.

(c) The term "employment agency" means any person regularly undertaking with or without compensation to procure employees for an employer or to procure for employees opportunities to work for an employer and includes an agent of such a person.

(d) The term "labor organization" means a labor organization engaged in an industry affecting commerce, and any agent of such an organization, and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization.

(e) A labor organization shall be deemed to be engaged in an industry affecting commerce if (1) it maintains or operates a hiring hall or hiring office which procures employees for an employer or procures for employees opportunities to work for an employer, or (2) the number of its members (or, where it is a labor organization composed of other labor organizations or their representatives, if the aggregate number of the members of such other labor organization) is (A) twenty-five or more during the first year after March 24, 1972, or (B) fifteen or more thereafter, and such labor organization—

(1) is the certified representative of employees under the provisions of the National Labor Relations Act, as amended [29 U.S.C. 151 et seq.], or the Railway Labor Act, as amended [45 U.S.C. 151 et seq.];

(2) although not certified, is a national or international labor organization or a local labor organization recognized or acting as the representative of employees of an employer or employers engaged in an industry affecting commerce; or

(3) has chartered a local labor organization or subsidiary body which is representing or actively seeking to represent employees of employers within the meaning of paragraph (1) or (2); or

(4) has been chartered by a labor organization representing or actively seeking to represent employees within the meaning of paragraph (1) or (2) as the local or subordinate body through which such employees may enjoy membership or become affiliated with such labor organization; or

(5) is a conference, general committee, joint or system board, or joint council subordinate to a national or international labor organization, which includes a labor organization engaged in an industry affecting commerce within the meaning of any of the preceding paragraphs of this subsection.

(f) The term "employee" means an individual employed by an employer, except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency or political subdivision.

(g) The term "commerce" means trade, traffic, commerce, transportation, transmission, or communication among the several States; or between a State and any place outside thereof; or within the District of Columbia, or a possession of the United States; or between points in the same State but through a point outside thereof.

(h) The term "industry affecting commerce" means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry "affecting commerce" within the meaning of the Labor-Management Reporting and Disclosure Act of 1959 [29 U.S.C. 401 et seq.],

and further includes any govermental industry, business or activity.

(i) The term "State" includes a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, and Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act [43 U.S.C. 1331 et seq.].

(j) The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

(k) The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions, and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 2000e-2(h) of this title shall be interpreted to permit otherwise. This subsection shall not require an employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term, or except where medical complications have arisen from an abortion: *Provided*, That nothing herein shall preclude an employer from providing abortion benefits or otherwise affect bargaining agreements in regard to abortion.

(Pub. L. 88-352, title VII, § 701, July 2, 1964, 78 Stat. 253; Pub. L. 89-554, § 8(a), Sept. 6, 1966, 80 Stat. 662; Pub. L. 92-261, § 2, Mar. 24, 1972, 86 Stat. 103; Pub. L. 95-555, § 1, Oct. 31, 1978, 92 Stat. 2076; Pub. L. 95-598, title III, § 330, Nov. 6, 1978, 92 Stat. 2679.)

REFERENCES IN TEXT

The National Labor Relations Act, as amended, referred to in subsec. (e)(1), is act July 5, 1935, ch. 372, 49 Stat. 452, as amended, which is classified generally to subchapter II (§ 151 et seq.) of chapter 7 of Title 29, Labor. For complete classification of this Act to the Code, see section 167 of Title 29 and Tables.

The Railway Labor Act, referred to in subsec. (e)(1), is act May 20, 1926, ch. 347, 44 Stat. 577, as amended, which is classified principally to chapter 8 (§ 151 et seq.) of Title 45, Railroads. For complete classification of this Act to the Code, see section 151 of Title 45 and Tables.

The Labor-Management Reporting and Disclosure Act of 1959, referred to in subsec. (h), is Pub. L. 86-257, Sept. 14, 1959, 73 Stat. 519, as amended, which is classified principally to chapter 11 (§ 401 et seq.) of Title 29, Labor. For complete classification of this Act to the Code, see Short Title note set out under section 401 of Title 29 and Tables.

For definition of Canal Zone, referred to in subsec. (i), see section 3602(b) of Title 22, Foreign Relations and Intercourse.

The Outer Continental Shelf Lands Act, referred to in subsec. (i), is act Aug. 7, 1953, ch. 345, 67 Stat. 462, as amended, which is classified generally to subchapter III (§ 1331 et seq.) of chapter 29 of Title 43, Public Lands. For complete classification of this Act to the Code, see Short Title note set out under section 1331 of Title 43 and Tables.

AMENDMENTS

1978—Subsec. (a). Pub. L. 95-598 substituted "trustees in cases under title 11" for "trustees in bankruptcy".

Subsec. (k). Pub. L. 95-555 added subsec. (k) ¶1972 Subsec. (a) Pub. L. 92-261, § 2(1), included within the term "person" governments, governmental agencies, and political subdivisions.

Subsec. (b). Pub. L. 92-261, § 2(2), substituted "fifteen or more employees" for "twenty-five or more employees", extended coverage to include State and local governments, excepted from coverage any department or agency of the District of Columbia subject by statute to procedures of the competitive service, as defined in section 2102 of title 5, and substituted provisions under which persons having fewer than twenty-five employees during the first year after March 24, 1972, were not to be considered employers, for provisions under which persons having fewer than a specified number of employees during the first year after the effective date of this section, and the second and third years after such date were not to be considered employers.

Subsec. (c). Pub. L. 92-261, § 2(3), struck out from the term "employment agency" exemption from coverage for agencies of the United States, States or political subdivisions of States, other than the United States Employment Service and the system of State and local employment services receiving Federal assistance.

Subsec. (e). Pub. L. 92-261, § 2(4), substituted provisions which set forth the number of members for a labor organization to be deemed to be engaged in an industry affecting commerce as twenty-five or more during the first year after March 24, 1972, and fifteen or more thereafter, for provisions which set forth the number of members for a labor organization to be deemed to be engaged in an industry affecting commerce as one hundred or more during the first year after the effective date of this section, seventy-five or more during the second year after such date, fifty or more during the third year after such date, and twenty-five or more thereafter.

Subsec. (f). Pub. L. 92-261, § 2(5), added the provisions enumerating persons excepted from the term "employee".

Subsec. (h). Pub. L. 92-261, § 2(6), added ", and further includes any governmental industry, business, or activity" following "labor-Management Reporting and Disclosure Act of 1959".

Subsec. (j). Pub. L. 92-261, § 2(7), added subsec. (j).

1966—Subsec. (b). Pub. L. 89-554 eliminated proviso which stated that it shall be the policy of the United States to insure equal employment opportunities for Federal employees without discrimination because of race, color, religion, sex, or national origin and directed the President to utilize his existing authority to effectuate this policy.

EFFECTIVE DATE OF 1978 AMENDMENT

Amendment by Pub. L. 95-598 effective Oct. 1, 1979, see section 402(a) of Pub. L. 95-598, set out as Effective Date note preceding section 101 of Title 11, Bankruptcy.

EFFECTIVE DATE OF 1978 AMENDMENT, EXCEPTIONS TO APPLICATION

Section 2 of Pub. L. 95-555 provided that:

"(a) Except as provided in subsection (b), the amendment made by this Act [amending this section] shall be effective on the date of enactment [Oct. 31, 1978].

"(b) The provisions of the amendment made by the first section of this Act, [amending this section] shall not apply to any fringe benefit program or fund, or insurance program which is in effect on the date of enactment of this Act [Oct. 31, 1978] until 180 days after enactment of this Act."

EFFECTIVE DATE

Subsecs. (a) and (b) of section 716 of Pub. L. 88-352 provided that:

"(a) This title [enacting sections 2000e, 2000e-1, 2000e-4, 2000e-7 to 2000e-15 of this title, and amending sections 2204 and 2205(a)(45) of former Title 5, Executive Departments and Government Officers and Employees] shall become effective one year after the date of its enactment [July 2, 1964].

"(b) Notwithstanding subsection (a), sections of this title other than sections 703, 704, 706, and 707 [sections 2000e-2,

2000e-3, 2000e-5, and 2000e-6 of this title] shall become effective immediately [July 2, 1964]."

READJUSTMENT OF BENEFITS

Section 3 of Pub. L. 95-555 provided that: "Until the expiration of a period of one year from the date of enactment of this Act, [Oct. 31, 1978] or, if there is an applicable collective-bargaining agreement in effect on the date of enactment of this Act, until the termination of that agreement, no person who, on the date of enactment of this Act is providing either by direct payment or by making contributions to a fringe benefit fund or insurance program benefits in violation with this Act [amending this section, and enacting provisions set out as a note above] shall, in order to come into compliance with this Act, reduce the benefits or the compensation provided any employee on the date of enactment of this Act, either directly or by failing to provide sufficient contributions to a fringe benefit fund or insurance program: *Provided*, That where the costs of such benefits on the date of enactment of this Act are apportioned between employers and employees, the payments or contributions required to comply with this Act may be made by employers and employees in the same proportion: *And provided further*, That nothing in this section shall prevent the readjustment of benefits or compensation for reasons unrelated to compliance with this Act."

EXECUTIVE ORDER NO. 11126

Ex. Ord. No. 11126, Nov. 1, 1963, 28 F.R. 11717, as amended by Ex. Ord. No. 11221, May 6, 1965, 30 F.R. 6427, which related to the Interdepartmental Committee on the Status of Women and the Citizens' Advisory Council on the Status of Women, was revoked by Ex. Ord. No. 12050, Apr. 4, 1978, 43 F.R. 14431, formerly set out as a note below.

Ex. Ord. No. 11246, Equal Opportunity in Federal Employment

Ex. Ord. No. 11246, Sept. 24, 1965, 30 F.R. 12319, as amended by Ex. Ord. No. 11375, Oct. 13, 1967, 32 F.R. 14303; Ex. Ord. No. 11478, Aug. 8, 1969, 34 F.R. 12985; Ex. Ord. No. 12086, Oct. 5, 1978, 43 F.R. 46501, provided:

Under and by virtue of the authority vested in me as President of the United States by the Constitution and statutes of the United States, it is ordered as follows:

Part I—Nondiscrimination in Government Employment

[Superseded. Ex. Ord. No. 11478, eff. Aug. 8, 1969, 34 F.R. 12985.]

Part II—Nondiscrimination in Employment by Government Contractors and Subcontractors

Subpart A-Duties of the Secretary of Labor

Sec. 201. The Secretary of Labor shall be responsible for the administration and enforcement of Parts II and III of this Order. The Secretary shall adopt such rules and regulations and issue such orders as are deemed necessary and appropriate to achieve the purposes of Parts II and III of this Order.

Subpart B-Contractors' Agreements

Sec. 202. Except in contracts exempted in accordance with Section 204 of this Order, all Government contracting agencies shall include in every Government contract hereafter entered into the following provisions:

"During the performance of this contract, the contractor agrees as follows:

"(1) The contractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex or national origin. The contractor will take affirmative action to ensure that applicants are employed, and that

employees are treated during employment, withour regard to their race, color, religion, sex or national origin. Such action shall include, but not be limited to the following: employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided by the contracting officer setting forth the provisions of this nondiscrimination clause.

"(2) The contractor will, in all solicitations or advertisements for employees placed by or on behalf of the contractor, state that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex or national origin.

"(3) The contractor will send to each labor union or representative of workers with which he has a collective bargaining agreement or other contract or understanding, a notice, to be provided by the agency contracting officer, advising the labor union or workers' representative of the contractor's commitments under Section 202 of Executive Order No. 11246 of September 24, 1965, and shall post copies of the notice in conspicuous places available to employees and applicants for employment.

"(4) The contractor will comply with all provisions of Executive Order No. 11246 of Sept. 24, 1965, and of the rules, regulations, and relevant orders of the Secretary of Labor.

"(5) The contractor will furnish all information and reports by Executive Order No. 11246 of September 24, 1965, and by the rules, regulations, and orders of the Secretary of Labor, or pursuant thereto, and will permit access to his books, records, and accounts by the contracting agency and the Secretary of Labor for purposes of investigation to ascertain compliance with such rules, regulations, and orders.

"(6) In the event of the contractor's noncompliance with the nondiscrimination clauses of this contract or with any of

such rules, regulations, or orders, this contract may be cancelled, terminated or suspended in whole or in part and the contractor may be declared ineligible for further Government contracts in accordance with procedures authorized in Executive Order No. 11246 of Sept. 24, 1965, and such other sanctions may be imposed and remedies invoked as provided in Executive Order No. 11246 of September 24, 1965, or by rule, regulation, or order of the Secretary of Labor, or as otherwise provided by law.

"(7) The contractor will include the provisions of paragraphs (1) through (7) in every subcontract or purchase order unless exempted by rules, regulations, or orders of the Secretary of Labor issued pursuant to Section 204 of Executive Order No. 11246 of September 24, 1965, [section 204 of this Order] so that such provisions will be binding upon each subcontractor or vendor. The contractor will take such action with respect to any subcontract or purchase order as may be directed by the Secretary of Labor as a means of enforcing such provisions including sanctions for noncompliance: *Provided, however,* that in the event the contractor becomes involved in, or is threatened with, litigation with a subcontractor or vendor as a result of such direction, the contractor may request the United States to enter into such litigation to protect the interests of the United States."

SEC. 203. (a) Each contractor having a contract containing the provisions prescribed in Section 202 shall file, and shall cause each of his subcontractors to file Compliance Reports with the contracting agency or the Secretary of Labor as may be directed. Compliance Reports shall be filed within such times and shall contain such information as to the practices, policies, programs, and employment policies, programs, and employment statistics of the contractor and each subcontractor, and shall be in such form, as the Secretary of Labor may prescribe.

(b) Bidders or prospective contractors or subcontractors may be required to state whether they have participated in any

previous contract subject to the provisions of this Order, or any preceding similar Executive order, and in that event to submit, on behalf of themselves and their proposed subcontractors, Compliance Reports prior to or as an initial part of their bid or negotiation of a contract.

(c) Whenever the contractor or subcontractor has a collective bargaining agreement or other contract or understanding with a labor union or an agency referring workers or providing or supervising apprenticeship or training for such workers, the Compliance Report shall include such information as to such labor union's or agency's practices and policies affecting compliance as the Secretary of Labor may prescribe: *Provided*, That to the extent such information is within the exclusive possession of a labor union or any agency referring workers or providing or supervising apprenticeship or training and such labor union or agency shall refuse to furnish such information to the contractor, the contractor shall so certify to the Secretary of Labor as part of its Compliance Report and shall set forth what efforts he has made to obtain such information.

(d) The Secretary of Labor may direct that any bidder or prospective contractor or subcontractor shall submit, as part of his Compliance Report, a statement in writing, signed by an authorized officer or agent on behalf of any labor union or any agency referring workers or providing or supervising apprenticeship or other training, with which the bidder or prospective contractor deals, with supporting information, to the effect that the signer's practices and policies do not descriminate on the grounds of race, color, religion, sex or national origin, and that the signer either will affirmatively cooperate in the implementation of the policy and provisions of this order or that it consents and agrees that recruitment, employment, and the terms and conditions of employment under the proposed contract shall be in accordance with the purposes and provisions of the order. In the event that the union, or the agency shall refuse to execute such a statement, the Compliance Report shall so certify and set forth what efforts have been

made to secure such a statement and such additional factual material as the Secretary of Labor may require.

SEC. 204. The Secretary of Labor may, when he deems that special circumstances in the national interest so require, exempt a contracting agency from the requirement of including any or all of the provisions of Section 202 of this Order in any specific contract, subcontract, or purchase order. The Secretary of Labor may, by rule or regulation, also exempt certain classes of contracts, subcontracts, or purchase orders (1) whenever work is to be or has been peformed outside the United States and no recruitment of workers within the limits of the United States is involved: (2) for standard commercial supplies or raw materials; (3) involving less than specified amounts of money or specified numbers of workers; or (4) to the extent that they involve subcontracts below a specified tier. The Secretary of Labor may also provide, by rule, regulation, or order, for the exemption of facilities of a contractor which are in all respects separate and distinct from activities of the contractor related to the performance of the contract: *Provided*, That such an exemption will not interfere with or impede the effectuation of the purposes of this order: *And provided further*, That in the absence of such an exemption all facilities shall be covered by the provisions of this Order.

SUBPART C—POWERS AND DUTIES OF THE SECRETARY OF LABOR AND THE CONTRACTING AGENCIES

SEC. 205. The Secretary of Labor shall be responsible for securing compliance by all Government contractors and subcontractors with this Order and any implementing rules or regulations. All contracting agencies shall comply with the terms of this Order and any implementing rules, regulations, or orders of the Secretary of Labor. Contracting agencies shall cooperate with the Secretary of Labor and shall furnish such information and assistance as the Secretary may require.

SEC. 206. (a) The Secretary of Labor may investigate the employment practices of any Government contractor or subcontractor to determine whether or not the contractual provisions specified in Section 202 of this Order have been violated. Such investigation shall be conducted in accordance with the procedures established by the Secretary of Labor.

(b) The Secretary of Labor may receive and investigate complaints by employees or prospective employees of a Government contractor or subcontractor which allege discrimination contrary to the contractual provisions specified in Section 202 of this Order.

SEC. 207. The Secretary of Labor shall use his best efforts, directly and through interested Federal, State, and local agencies, contractors, and all other available instrumentalities to cause any labor union engaged in work under Government contracts or any agency referring workers or providing or supervising apprenticeship or training for or in the course of such work to cooperate in the implementation of the purposes of this Order. The Secretary of Labor shall, in appropriate cases, notify the Equal Employment Opportunity Commission, the Department of Justice, or other appropriate Federal agencies whenever it has reason to believe that the practices of any such labor organization or agency violate Title VI or Title VII of the Civil Rights Act of 1964 [sections 2000d to 2000d-4 of this title and this subchapter] or other provision of Federal law.

SEC. 208. (a) The Secretary of Labor, or any agency, officer, or employee in the executive branch of the Government designated by rule, regulation, or order of the Secretary, may hold such hearings, public or private, as the Secretary may deem advisable for compliance, enforcement, or educational purposes.

(b) The Secretary of Labor may hold, or cause to be held, hearings in accordance with Subsection (a) of this Section prior to imposing, ordering, or recommending the imposition of penalties and sanctions under this Order. No order for

debarment of any contractor from further Government contracts under Section 209(a)(6) shall be made without affording the contractor an opportunity for a hearing.

SUBPART D—SANCTIONS AND PENALTIES

SEC. 209 (a) In accordance with such rules, regulations, or orders as the Secretary of Labor may issue or adopt, the Secretary may:

(1) Publish, or cause to be published, the names of contractors or unions which it has concluded have complied or have failed to comply with the provisions of this Order or of the rules, regulations, and orders of the Secretary of Labor.

(2) Recommend to the Department of Justice that, in cases in which there is substantial or material violation or the threat of substantial or material violation of the contractual provisions set forth in Section 202 of this Order, appropriate proceedings be brought to enforce those provisions, including the enjoining, within the limitations of applicable law, of organizations, individuals, or groups who prevent directly or indirectly, or seek to prevent directly or indirectly, compliance with the provisions of this Order.

(3) Recommend to the Equal Employment Opportunity Commission or the Department of Justice that appropriate proceedings be instituted under Title VII of the Civil Rights Act of 1964 [this subchapter].

(4) Recommend to the Department of Justice that criminal proceedings be brought for the furnishing of false information to any contracting agency or to the Secretary of Labor as the case may be.

(5) After consulting with the contracting agency, direct the contracting agency to cancel, terminate, suspend, or cause to be cancelled, terminated, or suspended, any contract, or any portion or portions thereof, for failure of the contractor or subcontractor to comply with equal employment opportunity provisions of the contract. Contracts may be cancelled, ter-

minated, or suspended absolutely or continuance of contracts may be conditioned upon a program for future compliance approved by the Secretary of Labor.

(6) Provide that any contracting agency shall refrain from entering into further contracts, or extensions or other modifications of existing contracts, with any noncomplying contractor, until such contractor has satisfied the Secretary of Labor that such contractor has established and will carry out personnel and employment policies in compliance with the provisions of this Order.

(b) Pursuant to rules and regulations prescribed by the Secretary of Labor, the Secretary shall make reasonable efforts, within a reasonable time limitation, to secure compliance with the contract provisions of this Order by methods of conference, conciliation, mediation, and persuasion before proceedings shall be instituted under subsection (a)(2) of this Section, or before a contract shall be cancelled or terminated in whole or in part under subsection (a)(5) of this Section.

SEC. 210. Whenever the Secretary of Labor makes a determination under Section 209, the Secretary shall promptly notify the appropriate agency. The agency shall take the action directed by the Secretary and shall report the results of the action it has taken to the Secretary of Labor within such time as the Secretary shall specify. If the contracting agency fails to take the action directed within thirty days, the Secretary may take action directly.

SEC. 211. If the Secretary of Labor shall so direct, contracting agencies shall not enter into contracts with any bidder or prospective contractor unless the bidder or prospective contractor has satisfactorily complied with the provisions of this Order or submits a program for compliance acceptable to the Secretary of Labor.

SEC. 212. When a contract has been cancelled or terminated under Section 209(a)(5) or a contractor has been debarred from further Government contracts under Section 209(a)(6) of this Order, because of noncompliance with the

contract provisions specified in Section 202 of this Order, the Secretary of Labor shall promptly notify the Comptroller General of the United States.

SUBPART E—CERTIFICATES OF MERIT

SEC. 213. The Secretary of Labor may provide for issuance of a United States Government Certificate of Merit to employers or labor unions, or other agencies which are or may hereafter be engaged in work under Government contracts, if the Secretary is satisfied that the personnel and employment practices of the employer, or that the personnel, training, apprenticeship, membership, grievance and representation, upgrading, and other practices, and policies of the labor union or other agency conform to the purposes and provisions of this Order.

SEC. 214. Any Certificate of Merit may at any time be suspended or revoked by the Secretary of Labor if the holder thereof, in the judgment of the Secretary, has failed to comply with the provisions of this Order.

SEC. 215. The Secretary of Labor may provide for the exemption of any employer, labor union, or other ageny from any reporting requirements imposed under or pursuant to this Order if such employer, labor union, or other agency has been awarded a Certificate of Merit which has not been suspended or revoked.

PART III-NONDISCRIMINATION PROVISIONS IN FEDERALLY ASSISTED CONSTRUCTION CONTRACTS

SEC. 301. Each executive department and agency which administers a program involving Federal financial assistance shall require as a condition for the approval of any grant, contract, loan insurance, or guarantee thereunder, which may involve a construction contract, that the applicant for Federal assistance undertake and agree to incorporate, or cause to be incorporated, into all construction contracts paid for in whole

or in part with funds obtained from the Federal Government or borrowed on the credit of the Federal Government pursuant to such grant, contract, loan, insurance, or guarantee, or untaken pursuant to any Federal program involving such grant, contract, loan, insurance, or guarantee, the provisions prescribed for Government contracts by Section 202 of this Order or such modification thereof, preserving in substance the contractor's obligations thereunder, as may be approved by the Secretary of Labor; together with such additional provisions as the Secretary deems appropriate to establish and protect the interest of the United States in the enforcement of those obligations. Each such applicant shall also undertake and agree (1) to assist and cooperate actively with the Secretary of Labor in obtaining the compliance of contractors and subcontractors with those contract provisions and with the rules, regulations and relevant orders of the Secretary, (2) to obtain and to furnish to the Secreatry of Labor such information as the Secretary may require for the supervision of such compliance, (3) to carry out sanctions and penalties for violation of such obligations imposed upon contractors and subcontractors by the Secretary of Labor pursuant to Part II, Subpart D, of this Order, and (4) to refrain from entering into any contract subject to this Order, or extension or other modification of such a contract with a contractor debarred from Government contracts under Part II, Subpart D, of this Order.

SEC. 302. (a) "Construction contract," as used in this Order means any contract for the construction, rehabilitation, alteration, conversion, extension, or repair of buildings, highways, or other improvements to real property.

(b) The provisions of Part II of this Order shall apply to such construction contracts, and for purposes of such application the administering department or agency shall be considered the contracting agency referred to therein.

(c) The term "applicant" as used in this Order means an applicant for Federal assistance or, as determined by agency

regulation, other program participant, with respect to whom an application for any grant, contract, loan, insurance, or guarantee is not finally acted upon prior to the effective date of this Part, and it includes such an applicant after he becomes a recipient of such Federal assistance.

SEC. 303(a). The Secretary of Labor shall be responsible for obtaining the compliance of such applicants with their undertakings under this Order. Each administering department and agency is directed to cooperate with the Secretary of Labor and to furnish the Secretary such information and assistance as the Secretary may require in the performance of the Secretary's functions under this Order.

(b) In the event an applicant fails and refuses to comply with the applicant's undertakings pursuant to this Order, the Secretary of Labor may, after consulting with the administering department or agency, take any or all of the following actions: (1) direct any administering department or agency to cancel, terminate, or suspend in whole or in part the agreement, contract or other arrangement with such applicant with respect to which the failure or refusal occurred; (2) direct any administering department or agency to refrain from extending any further assistance to the applicant under the program with respect to which the failure or refusal occurred until satisfactory assurance of future compliance has been received by the Secretary of Labor from such applicant; and (3) refer the case to the Department of Justice or the Equal Employment Opportunity Commission for appropriate law enforcement or other proceedings.

(c) In no case shall action be taken with respect to an applicant pursuant to clause (1) or (2) of subsection (b) without notice and opportunity for hearing.

SEC. 304. Any executive department or agency which imposes by rule, regulation, or order requirements of nondiscrimination in employment, other than requirements imposed pursuant to this Order, may delegate to the Secretary of

Labor by agreement such responsibilities with respect to compliance standards, reports, and procedures as would tend to bring the administration of such requirements into conformity with the administration or requirements imposed under this Order: *Provided*, That actions to effect compliance by recipients of Federal financial assistance with requirements imposed pursuant to Title VI of the Civil Rights Act of 1964 [sections 2000d to 2000d-4 of this title] shall be taken in conformity with the procedures and limitations prescribed in Section 602 thereof [section 2000d-1 of this title] and the regulations of the administering department or agency issued thereunder.

PART IV—MISCELLANEOUS

SEC. 401. The Secretary of Labor may delegate to any officer, agency, or employee in the Executive branch of the Government, any function or duty of the Secretary under Parts II and III of this Order.

SEC. 402. The Secretary of Labor shall provide administrative support for the execution of the program known as the "Plans for Progress."

SEC. 403. (a) (Executive Orders Nos. 10590 (January 19, 1955), 10722 (August 5, 1957), 10925 (March 6, 1961), 11114 (June 22, 1963), and 11162 (July 28, 1964), are hereby superseded and the President's Committee on Equal Employment Opportunity established by Executive Order No. 10925 is hereby abolished. All records and property in the custody of the Committee shall be transferred to the Civil Service Commission and the Secretary of Labor, as appropriate.

(b) Nothing in this Order shall be deemed to relieve any person of any obligation assumed or imposed under or pursuant to any Executive Order superseded by this Order. All rules, regulations, orders, instructions, designations, and other directives issued by the President's Committee of Equal Employment Opportunity and those issued by the heads of various departments or agencies under or pursuant to any of

the Executive orders superseded by this order, shall, to the extent that they are not inconsistent with this Order, remain in full force and effect unless and until revoked or superseded by appropriate authority. References in such directives to provisions of the superseded orders shall be deemed to be references to the comparable provisions of this Order.

SEC. 404. The General Services Administration shall take appropriate action to revise the standard Government contract forms to accord with the provisions of this Order and of the rules and regulations of the Secretary of Labor.

SEC. 405. This Order shall become effective thirty days after the date of this Order.

EX. ORD. NO. 11478. EQUAL EMPLOYMENT OPPORTUNITY IN FEDERAL GOVERNMENT

Ex. Ord. No. 11478, Aug. 8, 1969, 34 F.R. 12985, as amended by Ex. Ord. No. 11590, Apr. 23, 1971, 36 F.R. 7831, Ex. Ord. No. 12106, Dec. 26, 1978, 44 F.R. 1053, provided:

NOW THEREFORE, under and by virtue of the authority vested in me as President of the United States by the Constitution and statutes of the United States, it is ordered as follows:

SECTION 1. It is the policy of the Government of the United States to provide equal opportunity in Federal employment for all persons, to prohibit discrimination in employment because of race, color, religion, sex, national origin, handicap, or age, and to promote the full realization of equal employment opportunity through a continuing affirmative program in each executive department and agency. This policy of equal opportunity applies to and must be an integral part of every aspect of personnel policy and practice in the employment, development, advancement, and treatment of civilian employees of the Federal Government.

SEC. 2 The head of each executive department and agency shall establish and maintain an affirmative program of equal employment opportunity for all civilian employees and

applicants for employment within his jurisdiction in accordance with the policy set forth in section. 1. It is the responsibility of each department and agency head, to the maximum extent possible, to provide sufficient resources to administer such a program in a positive and effective manner; assure that recruitment activities reach all sources of job candidates; utilize to the fullest extent the present skills of each employee; provide the maximum feasible opportunity to employees to enhance their skills so they may perform at their highest potential and advance in accordance with their abilities; provide training and advice to managers and supervisors to assure their understanding and implementation of the policy expressed in this Order; assure participation at the local level with other employers, schools, and public or private groups in cooperative efforts to improve community conditions which effect employability; and provide for a system within the department or agency for periodically evaluating the effectiveness with which the policy of this Order is being carried out.

SEC. 3. The Equal Employment Opportunity Commission shall be responsible for directing and furthering the implementation of the policy of the Government of the United States to provide equal opportunity in Federal employment for all employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) and to prohibit discrimination in employment because of race, color, religion, sex, national origin, handicap, or age.

SEC. 4. The Equal Employment Opportunity Commission, after consultation with all affected departments and agencies, shall issue such rules, regulations, orders, and instructions and request such information from the affected departments and agencies as it deems necessary and appropriate to carry out this Order.

SEC. 5. All departments and agencies shall cooperate with and assist the Equal Employment Opportunity Commission in

the performance of its functions under this order and shall furnish the Commission such reports and information as it may request. The head of each department or agency shall comply with rules, regulations, orders and instructions issued by the Equal Employment Opportunity Commission pursuant to Section 4 of this Order.

SEC. 6. This Order applies (a) to military departments as defined in section 102 of title 5, United States Code, and executive agencies (other than the General Accounting Office) as defined in section 105 of title 5. United States Code, and to the employees thereof (including employees paid from nonappropriated funds), and (b) to those portions of the legislative and judicial branches of the Federal Government and of the Government of the District of Columbia having positions in the competitive service and to the employees in those positions. This Order does not apply to aliens employed outside the limits of the United States.

SEC. 7. Part I of Executive Order No. 11246 of September 24, 1965, and those parts of Executive Order No. 11375 of October 13, 1967, which apply to Federal employment, are hereby superseded.

SEC. 8. This Order shall be applicable to the United States Postal Service and to the Postal Rate Commission established by the Postal Reorganization Act of 1970 [Title 39, Postal Service].

EXECUTIVE ORDER NO. 12050

Ex. Ord. No. 12050, Apr. 4, 1978, 43 F.R. 14431, as amended by Ex. Ord. No. 12057, May 8, 1978, 43 F.R. 19811; Ex. Ord. No. 12135, May 9, 1979, 44 F.R. 27639; Ex. Ord. No. 12336, Dec. 21, 1981, 46 F.R. 62239, which established a National Advisory Committee for Women, was omitted in view of the revocation of sections 1 to 5 and 7 and 8 by Ex. Ord. No. 12135, May 9, 1979, 44 F.R. 27639 and the revocation of section 6 by Ex. Ord. No. 12336, Dec. 21, 1981, 46 F.R. 62239.

Ex. Ord. No. 12067. Coordination of Federal Equal Employment Opportunity Programs

Ex. Ord. No. 12067, June 30, 1978, 43 F.R. 28967, as amended by Ex. Ord. No. 12107, Dec. 28, 1978, 44 F.R. 1055, provided:

By virtue of the authority vested in me as President of the United States by the Constitution and statutes of the United States, including Section 9 of Reorganization Plan Number 1 of 1978 (43 FR 19807) [set out under section 2000e-4 of this title and in the Appendix to Title 5, Government Organizations and Employees], it is ordered as follows:

1-1. Implementation of Reorganization Plan

1-101. The transfer to the Equal Employment Opportunity Commission of all the functions of the Equal Employment Opportunity Coordinating Council, and the termination of that Council, as provided by Section 6 of Reorganization Plan Number 1 of 1978 (43 FR 19807) [set out under section 2000e-4 of this title and in the Appendix to Title 5, Government Organization and Employees] shall be effective on July 1, 1978.

1-2. Responsibilities of Equal Employment Opportunity Commission

1-201. The Equal Employment Opportunity Commission shall provide leadership and coordination to the efforts of Federal departments and agencies to enforce all Federal statutes, Executive orders, regulations, and policies which require equal employment opportunity without regard to race, color, religion, sex, national origin, age or handicap. It shall strive to maximize effort, promote efficiency, and eliminate conflict, competition, duplication and inconsistency among the operations, functions and jurisdictions of the Federal departments and agencies having responsibility for enforcing such statutes, Executive orders, regulations and policies.

1-202. In carrying out its functions under this order the Equal Employment Opportunity Commission shall consult with and utilize the special expertise of Federal departments and agencies with equal employment opportunity responsibilities. The Equal Employment Opportunity Commission shall cooperate with such departments and agencies in the discharge of their equal employment responsibilities.

1-203. All Federal departments and agencies shall coopertate with and assist the Equal Employment Opportunity Commission in the performance of its functions under this order and shall furnish the Commission such reports and information as it may request.

1-3. SPECIFIC RESPONSIBILITIES

1-301. To implement its responsibilities under Section 1-2, the Equal Employment Opportunity Commission shall, where feasible:

(a) develop uniform standards, guidelines, and policies defining the nature of employment discrimination on the ground of race, color, religion, sex, national origin, age or handicap under all Federal statutes, Executive orders, regulations, and policies which require equal employment opportunity;

(b) develop uniform standards and procedures for investigations and compliance reviews to be conducted by Federal departments and agencies under any Federal statute, Executive order, regulation or policy requiring equal employment opportunity;

(c) develop procedures with the affected agencies, including the use of memoranda of understanding, to minimize duplicative investigations or compliance reviews of particular employers or classes of employers or others covered by Federal statutes. Executive orders, regulations or policies requiring equal employment opportunity;

(d) ensure that Federal departments and agencies develop their own standards and procedures for undertaking enforcement actions when compliance with equal employment opportunity requirements of any Federal statute, Executive order, regulation or policy cannot be secured by voluntary means;

(e) develop uniform record-keeping and reporting requirements concerning employment practices to be utilized by all Federal departments and agencies having equal employment enforcement responsibilities;

(f) provide for the sharing of compliance records, findings, and supporting documentation among Federal departments and agencies responsible for ensuring equal employment opportunity;

(g) develop uniform training programs for the staff of Federal departments and agencies with equal employment opportunity responsibilities;

(h) assist all Federal departments and agencies with equal employment opportunity responsibilities in developing programs to provide appropriate publications and other information for those covered and those protected by Federal equal employment opportunity statutes, Executive orders, regulations, and policies; and

(i) initiate cooperative programs, including the development of memoranda of understanding between agencies, designed to improve the coordination of equal employment opportunity compliance and enforcement.

1-302. The Equal Employment Opportunity Commission shall assist the Office of Personnel Management, or its successor, in establishing uniform job-related qualifications and requirements for job classifications and descriptions for Federal employees involved in enforcing all Federal equal employment opportunity provisions.

1-303. The Equal Employment Opportunity Commission shall issue such rules, regulations, policies, procedures or orders as it deems necessary to carry out its responsibilities under this order. It shall advise and offer to consult with the affected Federal departments and agencies during the development of any proposed rules, regulations, policies, procedures or orders and shall formally submit such proposed issuances to affected departments and agencies at least 15 working days prior to public announcement. The Equal Employment Opportunity Commission shall use its best efforts to reach agreement with the agencies on matters in dispute. Departments and agencies shall comply with all final rules, regulations, policies, procedures or orders of the Equal Employment Opportunity Commission.

1-304. All Federal departments and agencies shall advise and offer to consult with the Equal Employment Opportunity Commission during the development of any proposed rules, regulations, policies, procedures or orders concerning equal employment opportunity. Departments and agencies shall

formally submit such proposed issuances to the Equal Employment Opportunity Commission and other interested Federal departments and agencies at least 15 working days prior to public announcement. The Equal Employment Opportunity Commission shall review such proposed rules, regulations, policies, procedures or orders to ensure consistency among the operations of the various Federal departments and agencies. Issuances related to internal management and administration are exempt from this clearance process. Case handling procedures unique to a single program also are exempt, although the Equal Employment Opportunity Commission may review such procedures in order to assure maximum consistency within the Federal equal employment opportunity program.

1-305. Before promulgating significant rules, regulations, policies, procedures or orders involving equal employment opportunity, the Commission and affected departments and agencies shall afford the public an opportunity to comment.

1-306. The Equal Employment Opportunity Commission may make recommendations concerning staff size and resource needs of the Federal departments and agencies having equal employment opportunity responsibilities to the Office of Management and Budget.

1-307. (a) It is the intent of this order that disputes between or among agencies concerning matters covered by this order shall be resolved through good faith efforts of the affected agencies to reach mutual agreement. Use of the dispute resolution mechanism contained in Subsections (b) and (c) of this Section should be resorted to only in extraordinary circumstances.

(b) Whenever a dispute which cannot be resolved through good faith efforts arises between the Equal Employment Opportunity Commission and another Federal department or agency concerning the issuance of an equal employment opportunity rule, regulation, policy, procedure, order or any matter covered by this Order, the Chairman of the Equal

Employment Opportunity Commission or the head of the affected department or agency may refer the matter to the Executive Office of the President. Such reference must be in writing and may not be made later than 15 working days following receipt of the initiating agency's notice of intent publicly to announce an equal employment opportunity rule, regulation, policy, procedure or order. If no reference is made within the 15 day period, the decision of the agency which initiated the proposed issuance will become effective.

(c) Following reference of a disputed matter to the Executive Office of the President, the Assistant to the President for Domestic Affairs and Policy (or such other official as the President may designate) shall designate an official within the Executive Office of the President to meet with the affected agencies to resolve the dispute within a reasonable time.

1-4. Annual Report

1-401. The Equal Employment Opportunity Commission shall include in the annual report transmitted to the President and the Congress pursuant to Section 715 of Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. 2000e-14), a statement of the progress that has been made in achieving the purpose of this order. The Equal Employment Opportunity Commission shall provide Federal departments and agencies an opportunity to comment on the report prior to formal submission.

1-5. General Provisions

1-501. Nothing in this orider shall relieve or lessen the responsibilities or obligations imposed upon any person or entity by Federal equal employment law, Executive order, regulation or policy.

1-502. Nothing in this order shall limit the Attorney General's role as legal adviser to the Executive Branch

Jimmy Carter

Ex. Ord. No. 12086. Consolidation of Contract Compliance Functions for Equal Employment Opportunity

Ex. Ord. No. 12086, Oct. 5, 1978; 43 F.R. 46501, provided:

By the authority vested in me as President by the Constitution and statutes of the United States of America, including Section 202 of the Budget and Accounting Procedures Act of 1950 (31 U.S.C. 581c) [31 U.S.C. 1531], in order to provide for the transfer to the Department of Labor certain contract compliance functions relating to equal employment opportunity, it is hereby ordered as follows:

1-1. Transfer of Functions

1-101. The functions concerned with being primarily responsible for the enforcement of the equal employment opportunity provisions under Parts II and III of Executive Order. No. 11246, as amended [set out as a note above], are transferred or reassigned to the Secretary of Labor from the following agencies:

(a) Department of the Treasury
(b) Department of Defense
(c) Department of the Interior
(d) Department of Commerce
(e) Department of Health, Education, and Welfare [now Health and Human Services]
(f) Department of Housing and Urban Development
(g) Department of Transportation
(h) Department of Energy
(i) Environmental Protection Agency
(j) General Services Administration
(k) Small Business Administration

1-102. The records, property, personnel and positions, and unexpended balances of appropriations or funds related to the functions transferred or reassigned by this Order, that are available and necessary to finance or discharge those functions, are transferred to the Secretary of Labor.

1-103. The Director of the Office of Management and Budget shall make such determinations, issue such orders, and take all actions necessary or appropriate to effectuate the transfers or reassignments provided by this Order, including the transfer of funds, records, property, and personnel.

1-2. CONFORMING AMENDMENTS TO EXECUTIVE ORDER No. 11246

1-201(a). In order to reflect the transfer of enforcement responsibility to the Secretary of Labor, Section 201 of Executive Order No. 11246, as amended, is amended to read:

"SEC. 201. The Secretary of Labor shall be responsible for the administration and enforcement of Parts II and III of this Order. The Secretary shall adopt such rules and regulations and issue such orders as are deemed necessary and appropriate to achieve the purposes of Parts II and III of this Order".

(b) Pargaraph (7) of the contract clauses specified in Section 202 of Executive Order No. 11246, as amended, is amended to read:

"(7) The contractor will include the provisions of paragraphs (1) through (7) in every subcontract or purchase order unless exempted by rules, regulations, or orders of the Secretary of Labor issued pursuant to Section 204 of Executive Order No. 11246 of September 24, 1965, so that such provision will be binding upon each subcontractor or vendor. The contractor will take such action with respect to any subcontractor or purchase order as may be directed by the Secretary of Labor as a means of enforcing such provisionss including sanctions for noncompliance: *Provided, however*, that in the event the contractor becomes involved in, or is threatened with, litigation with a subcontractor or vendor as a result of such direction, the contractor may request the United States to enter into such litigation to protect the interests of the United States."

1-202. In subsection (c) of Section 203 of Executive Order No. 11246, as amended, delete "contracting agency" in the proviso and substitute "Secretary of Labor" therefor.

1-203. In both the beginning and end of subsection (d) of Section 203 of Executive Order No. 11246, as amended, delete "contracting agency or the" in the phrase "contracting agency or the Secretary".

1-204. Section 205 of Executive Order No. 11246, as amended, is amended by deleting the last two sentences, which dealt with agency designation of compliance officers, and revising the rest of that Section to read:

"SEC. 205. The Secretary of Labor shall be responsible for securing compliance by all Government contractors and subcontractors with this Order and any implementing rules or regulations. All contracting agencies shall comply with the terms of this Order and any implementing rules, regulations, or orders of the Secretary of Labor. Contracting agencies shall cooperate with the Secretery of Labor and shall furnish such information and assistance as the Secretary may require.".

1-205. In order to delete references to the contracting agencies conducting investigations, Section 206 of Executive Order No. 11246, as amended, is amended to read:

"SEC. 206. (a) The Secretary of Labor may investigate the employment practices of any Government contractor or subcontractor to determine whether or not the contractual provisions specified in Section 202 of this order have been violated. Such investigation shall be conducted in accordance with the procedures established by the Secretary of Labor.".

"(b) The Secretary of Labor may receive and investigate complaints by employees or prospective employees of a Government contractor or subcontractor which allege discrimination contrary to the contractual provisions specified in Section 202 of this Order.".

1-206. In Section 207 of Executive Order No. 11246, as amended, delete "contracting agencies, other" in the first sentence.

1-207. The introductory clause in Section 209(a) of Executive Order No. 11246, as amended, is amended by deleting "or the appropriate contracting agency" from "In accordance with such rules, regulations, or orders as the Secretary of Labor may issue or adopt, the Secretary or the appropriate contracting agency may.".

1-208. In paragraph (5) of Section 209(a) of Executive Order No. 11246, as amended, insert at the beginning the phrase "After consulting with the contracting agency, direct the contracting agency to", and at the end of paragraph (5) delete "contracting agency" and substitute therefor "Secretary of Labor" so that paragraph (5) is amended to read:

"(5) After consulting with the contracting agency, direct the contracting agency to cancel, terminate, suspend, or cause to be cancelled, terminated, or suspended, any contract, of any portion or portions thereof, for failure of the contractor or subcontractor to comply with equal employment opportunity provisions of the contract. Contracts may be cancelled, terminated, or suspended absolutely or continuance of contracts may be conditioned upon a program for future compliance approved by the Secretary of Labor.".

1-209. In order to reflect the transfer from the agencies to the Secretary of Labor of the enforcement functions, substitute "Secretary of Labor" for "each contracting agency" in Section 209(b) of Executive Order 11246, as amended, so that Section 209(b) is amended to read:

"(b) Pursuant to rules and regulations prescribed by the Secretary of Labor, the Secretary shall make reasonable efforts, within a reasonable time limitation, to secure compliance with the contract provisions of this Order by methods of conference, conciliation, mediation, and persuasion before proceedings shall be instituted under subsection (a)(2) of this Section, or before a contract shall be cancelled or terminated in whole or in part under subsection (a)(5) of this Section.".

1-210. In order to reflect the responsibility of the contracting agencies for prompt compilance with the directions of the Secretary of Labor, Sections 210 and 211 of Executive Order No. 11246, as amended, are amended to read:

"SEC. 210. Whenever the Secretary of Labor makes a determination under Section 209, the Secretary shall promptly notify the appropriate agency. The agency shall take the action directed by the Secretary and shall report the results of the action it has taken to the Secretary of Labor within such time as the Secretary shall specify. If the contracting agency fails to take the action directed within thirty days, the Secretary may take the action directly.".

"SEC. 211. If the Secretary of Labor shall so direct, contracting agencies shall not enter into contracts with any bidder or prospective contractor unless the bidder or prospective contractor has satisfactorily complied with the provisions of this Order or submits a program for compliance acceptable to the Secretary of Labor.".

1-211. Section 212 of Executive Order No. 11246, as amended, is amended to read:

"SEC. 212. When a contract has been cancelled or terminated under Section 209(a)(5) or a contractor has been debarred from further Government contracts under Section 209(a)(6) of this Order, because of noncompliance with the contract provisions specified in Section 202 of this Order, the Secretary of Labor shall promptly notify the Comptroller General of the United States.".

1-212. In order to reflect the transfer of enforcement responsibility to the Secretary of Labor, references to the administering department or agency are deleted in clauses (1), (2), and (3) of Section 301 of Executive Order No. 11246, as amended, and those clauses are amended to read:

"(1) to assist and cooperate actively with the Secretary of Labor in obtaining the compliance of contractors and subcontractors with those contract provisions and with the rules, regulations and relevant orders of the Secretary, (2) to obtain

and to furnish to the Secretary of Labor such information as the Secretary may require for the supervision of such compilance, (3) to carry out sanctions and penalties for violation of such obligations imposed upon contractors and subcontractors by the Secretary of Labor pursuant to Part II, Subpart D, of this Order.".

1-213. In order to reflect the transfer from the agencies to the Secretary of Labor of the enforcement functions "Secretary of Labor" shall be substituted for "administering department or agency" in Section 303 of Executive Order No. 11246, as amended, and Section 303 is amended to read:

"SEC. 303(a). The Secretary of Labor shall be responsible for obtaining the compliance of such applicants with their undertakings under this Order. Each administering department and agency is directed to cooperate with the Secretary of Labor and to furnish the Secretary such information and assistance as the Secretary may require in the performance of the Secretary's functions under this Order.".

"(b) In the event an applicant fails and refuses to comply with the applicant's undertakings pursuant to this Order, the Secretary of Labor may, after consulting with the administering department or agency, take any or all of the following actions: (1) direct any administering department or agency to cancel, terminate, or suspend in whole or in part the agreement, contract or other arrangement with such applicant with respect to which the failure or refusal occurred; (2) direct any administering department or agency to refrain from extending any further assistance to the applicant under the program with respect to which the failure or refusal occurred until satisfactory assurance of future compliance has been received by the Secretary of Labor from such applicant; and (3) refer the case to the Department of Justice or the Equal Employment Opportunity Commission for appropriate law enforcement or other proceedings.".

"(c) In no case shall action be taken with respect to an applicant pursuant to clause (1) or (2) of subsection (b) without notice and opportunity for hearing.".

1-214. Section 401 of Executive Order No. 11246, as amended, is amended to read:

"SEC. 401 The Secretary of Labor may delegate to any officer, agency, or employee in the Executive branch of the Government, any function or duty of the Secretary under Parts II and III of this Order.".

1-3. GENERAL PROVISIONS

1-301. The transfers or reassignments provided by Section 1-1 of this Order shall take effect at such time or times as the Director of the Office of Management and Budget shall determine. The Director shall ensure that all such transfers or reassignments take effect within 60 days.

1-302. The conforming amendments provided by Section 1-2 of this Order shall take effect on October 8, 1978, except that, with respect to those agencies identified in Section 1-101 of this Order, the conforming amendments shall be effective on the effetive date of the transfer or reassignment of functions as specified pursuant to Section 1-301 of this Order.

JIMMY CARTER

EXECUTIVE ORDER NO. 12135

Ex. Ord. No. 12135, May 9, 1979, 44 F.R. 27639, which established the President's Advisory Committee for Women, was revoked by Ex. Ord. No. 12336, Dec. 21, 1981, 46 F.R. 62239, set out as a note below.

EX. ORD. NO. 12336. TASK FORCE ON LEGAL EQUITY FOR WOMEN

Ex. Ord. No. 12336, Dec. 21, 1981, 46 F.R. 62239, as amended by Ex. Ord. No. 12355, Apr. 1, 1982, 47 F.R. 14479, provided:

By the authority vested in me as President by the Constitution of the United States of America, and in order to provide for the systematic elimination of regulatory and procedural barriers which have unfairly precluded women from receiving equal treatment from Federal activities, it is hereby ordered as follows:

SECTION 1. *Establishment.* (a) There is established the Task Force on Legal Equity for Women.

(b) The Task Force members shall be appointed by the President from among nominees by the heads of the following Executive agencies, each of which shall have one representative on the Task Force.

(1) Department of State.
(2) Department of The Treasury.
(3) Department of Defense.
(4) Department of Justice.
(5) Department of The Interior.
(6) Department of Agriculture.
(7) Department of Commerce.
(8) Department of Labor.
(9) Department of Health and Human Services.
(10) Department of Housing and Urban Development.
(11) Department of Transportation.
(12) Department of Energy.
(13) Department of Education.
(14) Agency for International Development.
(15) Veterans Administration.
(16) Office of Management and Budget.
(17) International Communication Agency.
(18) Office of Personnel Management.
(19) Environmental Protection Agency.
(20) ACTION.
(21) Small Business Administration.

(c) The President shall designate one of the members to chair the Task Force. Other agencies may be invited to participate in the function of the Task Force.

SEC. 2. *Functions.* (a) The members of the Task Force shall be responsible for coordinating and facilitating in their respective agencies, under the direction of the head of their agency, the implementation of changes ordered by the President in sex-discriminatory Federal regulations, policies, and practices.

(b) The Task Force shall periodically report to the President on the progress made throughout the Government in implementing the President's directives.

(c) The Attorney General shall complete the review of Federal laws, regulations, policies, and pratices which contain language that unjustifiably differentiates, or which effectively discriminates, on the basis of sex. The Attorney General or his designee shall, on a quarterly basis, report his findings to the President through the Cabinet Council on Legal Policy.

SEC. 3. *Administration.* (a) The head of each Executive agency shall, to the extent permitted by law, provide the Task Force with such information and advice as the Task Force may identify as being useful to fulfill its functions.

(b) The agency with its representative chairing the Task Force shall, to the extent permitted by law, provide the Task Force with such adminisegregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

§ 2000e-1. Subchapter not applicable to employment of aliens outside State and individuals for performance of activities of religious corporations, associations, educational institutions, or societies.

This subchapter shall not apply to an employer with respect to the employment of aliens outside any State, or to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.

(Pub. L. 88-352, title VII, § 702, July 2, 1964, 78 Stat. 255; Pub. L. 92-261, § 92-261, § 3, Mar. 24, 1972, 86 Stat. 103.)

AMENDMENTS

1972—Pub. L. 92-261 struck out the exemption for the employment of individuals engaged in educational activities of nonreligious educational institutions.

§2000e-2. Unlawful employment practices

(a)Employer practices

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

(b) Employment agency practices

It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin.

(c) Labor organization practices

It shall be an unlawful employment practice for a labor organization—

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(d) Training programs

It shall be an unlawful employment practice for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provided apprenticeship or other training.

(e) Businesses or enterprises with personnel qualified on basis of religion, sex, or national origin; educational institutions with personnel of particular religion

Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, and (2) it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.

(f) Members of Communist Party or Communist-action or Communist-front organizations

As used in this subchapter, the phrase "unlawful employment practice" shall not be deemed to include any action or measure taken by an employer, labor organization, joint labor-management committee, or employment agency with

respect to an individual who is a member of the Communist Party of the United States or of any other organization required to register as a Communist-action or Communist-front organization by final order of the Subversive Activities Control Board pursuant to the Subversive Activities Control Act of 1950 [50 U.S.C. 781 et seq.].

(g) **National security**

Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to fail or refuse to hire and employ any individual for any position, for an employer to discharge any individual from any position, or for an employment agency to fail or refuse to refer any individual for employment in any position, or for a labor organization to fail or refuse to refer any individual for employment in any position if —

(1) the occupancy of such position, or access to the premises in or upon which any part of the duties of such position is performed or is to be performed, is subject to any requirement imposed in the interest of the national security of the United States under any security program in effect pursuant to or administered under any statute of the United States or any Executive Order of the President; and

(2) such individual has not fulfilled or has ceased to fulfill that requirement.

(h) **Seniority or merit system; quantity or quality of production; ability tests; compensation based on sex and authorized by minimum wage provisions**

Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different

terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of title 29.

(i) Businesses or enterprises extending preferential treatment to Indians

Nothing contained in this subchapter shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which a perferential treatment is given to any individual because he is an Indian living on or near a reservation.

(j) Preferential treatment not to be granted on account of existing number or percentage imbalance

Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national

origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

(Pub. L. 88-352, title VII, § 703, July 2, 1964, 78 Stat. 255; Pub. L. 92-261, § 8(a), (b), Mar. 24, 1972, 86 Stat. 109.)

REFERENCES IN TEXT

The Subversive Activities Control Act of 1950, referred to in subsec. (f), is title I of act Sept. 23, 1950, ch. 1024, 64 Stat. 987, as amended, which is classified principally to subchapter I (§ 781 et seq.) of chapter 23 of Title 50, War and National Defense. For complete classification of this Act to the Code, see Short Title note set out under section 781 of Title 50 and Tables.

AMENDMENTS

1972 — Subsec. (a)(2), Pub. L. 92-261, § 8(a), added "or applicants for employment" following "his employees".

Subsec. (c)(2), Pub. L. 92-261, § 8(b), added "or applicants for membership" following "membership".

SUBVERSIVE ACTIVITIES CONTROL BOARD

The Subversive Activities Control Board was established by act Sept. 23, 1950, ch. 1024, § 12, 64 Stat. 977, and ceased to operate on June 30, 1973.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 2000e, 2000e-5 of this title.

§ 2000e-3. Other unlawful employment practices

(a) Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

(b) Printing or publication of notices or advertisements indicating prohibited preference, limitation, specification, or discrimination; occupational qualification exception

It shall be an unlawful employment practice for an employer, labor organization, employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to print or publish or cause to be printed or published any notice or advertisement relating to employment by such an employer or membership in or any classification or referral for employment by such a labor organization, or relating to any classification or referral for employment by such an employment agency, or relating to admission to, or employment in, any program established to provide apprenticeship or other training by such joint labor-management committee, indicating any preference, limitation, specification, or discrimination, based on race, color, religion, sex, or national origin,

except that such a notice or advertisement may indicate a preference, limitation, specification, or discrimination based on religion, sex, or national origin when religion, sex, or national origin is a bona fide occupational qualification for employment.
(Pub. L. 88-352, title VII, § 704, July 2, 1964, 78 Stat. 257; Pub. L. 92-261, § 8(c), Mar. 24, 1972. 86 Stat. 109.)

AMENDMENTS

1972 — Subsec. (a), Pub. L. 92-261, § 8(c)(1), added provision making it an unlawful employment practice for a joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against the specified individuals.

Subsec. (b), Pub. L. 92-261, § 8(c)(2), added provisions making prohibitions applicable to joint labor-management committees controlling apprenticeship or other training or retraining, including on-the-job training programs, and notices or advertisements of such joint labor-management committees relating to admission to, or employment in, any program established to provide apprenticeship or other training.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 2000e-5 of this title.

§ 2000e-4. Equal Employment Opportunity Commission

(a) Creation; composition; political representation; appointment; term; vacancies; Chairman and Vice Chairman; duties of Chairman; appointment of personnel; compensation of personnel

There is hereby created a Commission to be known as the Equal Employment Opportunity Commission, which shall be composed of five members, not more than three of whom shall

be members of the same political party. Members of the Commision shall be appointed by the President by and with the advice and consent of the Senate for a term of five years. Any individual chosen to fill a vacancy shall be appointed only for the unexpired term of the member whom he shall succeed, and all members of the Commission shall continue to serve until their successors are appointed and qualified, except that no such member of the Commission shall continue to serve (1) for more than sixty days when the Congress is in session unless a nomination to fill such vacancy shall have been submitted to the Senate, or (2) after the adjournment sine die of the session of the Senate in which such nomination was submitted. The President shall designate one member to serve as Chairman of the Commission, and one member to serve as Vice Chairman. The Chairman shall be responsible on behalf of the Commission for the administrative operations of the Commission, and, except as provided in subsection (b) of this section, shall appoint, in accordance with the provisions of title 5 governing appointments in the competitive service, such officers, agents, attorneys, administrative law judges, and employees as he deems necessary to assist it in the performance of its functions and to fix their compensation in accordance with the provisions of chapter 51 and subchapter III of chapter 53 of title 5, relating to classification and General Schedule pay rates: *Provided,* That assignment, removal, and compensation of administrative law judges shall be in accordance with sections 3105, 3344, 5372, and 7521 of title 5.

(b) **General Counsel; appointment; term; duties; representation by attorneys and Attorney General**

(1) There shall be a General Counsel of the Commission appointed by the President, by and with the advice and consent of the Senate, for a term of four years. The General Counsel shall have responsibility for the conduct of litigation as provided in sections 2000e-5 and 2000e-6 of this title. The General

Counsel shall have such other duties as the Commission may prescribe or as may be provided by law and shall concur with the Chairman of the Commission on the appointment and supervision of regional attorneys. The General Counsel of the Commission on the effective date of this Act shall continue in such position and perform the functions specified in this subsection until a successor is appointed and qualified.

(2) Attorneys appointed under this section may, at the direction of the Commission, appear for and represent the Commission in any case in court, provided that the Attorney General shall conduct all litigation to which the Commission is a party in the Supreme Court pursuant to this subchapter.

(c) Exercise of powers during vacancy; quorum

A vacancy in the Commission shall not impair the right of the remaining members to exercise all the powers of the Commission and three members thereof shall constitute a quorum.

(d) Seal; judicial notice

The Commission shall have an official seal which shall be judicially noticed.

(e) Reports to Congress and the President

The Commission shall at the close of each fiscal year report to the Congress and to the President concerning the action it has taken and the moneys it has disbursed. It shall make such further reports on the cause of and means of eliminating discrimination and such recommendations for further legislation as may appear desirable.

(f) Principal and other offices

The principal office of the Commission shall be in or near the District of Columbia, but it may meet or exercise any or all

its powers at any other place. The Commission may establish such regional or State offices as it deems necessary to accomplish the purpose of this subchapter.

(g) Powers of Commission

The Commission shall have power —

(1) to cooperate with and, with their consent, utilize regional, State, local, and other agencies, both public and private, and individuals;

(2) to pay to witnesses whose depositions are taken or who are summoned before the Commission or any of its agents the same witness and mileage fees as are paid to witnesses in the courts of the United States;

(3) to furnish to persons subject to this subchapter such technical assistance as they may request to further their compliance with this subchapter or an order issued thereunder;

(4) upon the request of (i) any employer, whose employees or some of them, or (ii) any labor organization, whose members or some of them, refuse or threaten to refuse to cooperate in effectuating the provisions of this subchapter, to assist in such effectuation by conciliation or such other remedial action as is provided by this subchapter;

(5) to make such technical studies as are appropriate to effectuate the purposes and policies of this subchapter and to make the results of such studies available to the public;

(6) to intervene in a civil action brought under section 2000e-5 of this title by an aggrieved party against a respondent other than a government, governmental agency or political subdivision.

(h) Cooperation with other departments and agencies in performance of educational or promotional activities

The Commission shall, in any of its educational or promotional activities, cooperate with other departments and agencies in the performance of such educational and promotional activities.

(i) Personnel subject to political activity restrictions

All officers, agents, attorneys, and employees of the Commission shall be subject to the provisions of section 7324 of title 5, notwithstanding any exemption contained in such section. (Pub. L. 88-352, title VII, § 705, July 2, 1964, 78 Stat. 258; Pub. L. 92-261, § 8 (d)-(f), Mar. 24, 1972, 86 Stat. 109, 110; Pub. L. 93-608, § 3(1), Jan. 2, 1975, 88 Stat. 1972; Pub. L. 95-251, § 2(a)(11), Mar. 27, 1978, 92 Stat. 183.)

REFERENCES IN TEXT

The provisions of title 5 governing appointments in the competitive service, referred to in subsec. (a), are classified to section 3301 et seq. of Title 5, Government Organization and Employees.

The General Schedule, referred to in subsec. (a), is set out under section 5332 of Title 5.

The effective date of this Act, referred to in subsec. (b)(1), probably means the date of enactment of Pub. L. 92-261, which was approved Mar. 24, 1972.

CODIFICATION

In subsec. (a), reference to section 5372 of title 5 was substituted for section 5362 on authority of Pub. L. 95-454, § 801 (a)(3)(A)(ii), Oct. 13, 1978, 92 Stat. 1221, which redesignated sections 5361 through 5365 of title 5 as sections 5371 through 5375.

In subsec. (i), "section 7324 of title 5" was substituted for "section 9 of the Act of August 2, 1939, as amended (the Hatch Act)" on authority of Pub. L. 89-554, § 7(b), Sept. 6, 1966, 80 Stat. 631, the first section of which enacted Title 5, Government Organization and Employees. Prior to the enactment of Title 5, section 9 of the Act of August 2, 1939, as amended, was classified to section 118i of Title 5.

AMENDMENTS

1978 — Subsec. (a), Pub. L. 95-251 substituted "administrative law judges" for "hearing examiners" wherever appearing.

1975 — Subsec. (e), Pub. L. 93-608 struck out reporting requirement of names, salaries, and duties of all individuals in employ of Commission.

1972 — Subsec. (a), Pub. L. 92-261, § 8(d), struck out provisions setting forth the length of the terms of the original members of the Commission and provisions authorizing the Vice Chairman to act as Chairman in certain circumstances, added provisions relating to the continuation in office of all members of the Commission, and substituted provisions requiring appointment of officers, etc., in accordance with the provisions of title 5, fixing compensation of such officers, etc., in accordance with the provisions of chapter 51 and subchapter III of chapter 53 of title 5, relating to classification and General Schedule pay rates, and requiring assignment, removal, and compensation of hearing examiners in accordance with the specified sections, for provisions requiring appointment of officers, etc., in accordance with the civil service laws, and fixing compensation of such officers, etc., in accordance with the Classification Act of 1949, as amended.

Subsecs. (b) to (e), Pub. L. 92-261, § 8(e), added subsec. (b), struck out subsec. (e), which amended sections 2204 and 2205 of former Title 5, Executive Departments and Government Officers and Employees, and redesignated existing subsecs. (b), (c), and (d) as (c), (d), and (e), respectively.

Subsec. (g)(6), Pub. L. 92-261, § 8(f), substituted provisions which authorized the Commission to intervene in a civil action brought under section 2000e-5 of this title where the respondent is other than a government, governmental agency, or political subdivision for provisions which authorized the Commission to refer matters to the Attorney General with recommendations to intervene or institute civil actions.

Subsecs. (h) to (j), Pub. L. 92-261, § 8(e)(2), (3), struck out subsec. (h), which provided for legal representation for the Commission, and redesignated subsecs. (i) and (j) as (h) and (i), respectively.

REORGANIZATION PLAN NO. 1 OF 1978 SUPERSEDED BY CIVIL SERVICE REFORM ACT OF 1978

Section 905 of Pub. L. 95-454, Oct. 13, 1978, 92 Stat. 1224, provided in part that any provision in Reorganization Plan No. 1 of 1978 [set out below] inconsistent with any provision of that Act [see Tables for classification] was superseded thereby.

REORGANIZATION PLAN NO. 1 OF 1978

43 F.R. 19807, 92 STAT. 3781

PREPARED BY THE PRESIDENT AND TRANSMITTED TO THE SENATE AND THE HOUSE OF REPRESENTATIVES IN CONGRESS ASSEMBLED, FEBRUARY 23, 1978, PURSUANT TO THE PROVISIONS OF CHAPTER 9 OF TITLE 5 OF THE UNITED STATES CODE.

EQUAL EMPLOYMENT OPPORTUNITY

SECTION 1. TRANSFER OF EQUAL PAY ENFORCEMENT FUNCTIONS

All functions related to enforcing or administering Section 6(d) of the Fair Labor Standards Act, as amended, (29 U.S.C. 206(d)) are hereby transferred to the Equal Employment Opportunity Commission. Such functions include, but shall

not be limited to, the functions relating to equal pay administration and enforcement now vested in the Secretary of Labor, the Administrator of the Wage and Hour Division of the Department of Labor, and the Civil Service Commission pursuant to Sections 4(d)(1); 4(f); 9; 11(a), (b), and (c); 16(b) and (c) and 17 of the Fair Labor Standards Act, as amended, (29 U.S.C. 204(d)(1); 204(f); 209; 211(a), (b), and (c); 216 (b) and (c) and 217) and Section 10(b)(1) of the Portal-to-Portal Act of 1947, as amended, (29 U.S.C. 259).

SEC. 2. TRANSFER OF AGE DISCRIMINATION ENFORCEMENT FUNCTIONS

All functions vested in the Secretary of Labor or in the Civil Service Commission pursuant to Sections 2, 4, 7, 8, 9, 10, 11, 12, 13, 14, and 15 of the Age Discrimination in Employment Act of 1967, as amended, (29 U.S.C. 621, 623, 626, 627, 628, 629, 630, 631, 632, 633, and 633a) are hereby transferred to the Equal Employment Opportunity Commission. All functions related to age discrimination administration and enforcement pursuant to Sections 6 and 16 of the Age Discrimination in Employment Act of 1967, as amended, (29 U.S.C. 625 and 634) are hereby transferred to the Equal Employment Opportunity Commission.

SEC. 3. TRANSFER OF EQUAL OPPORTUNITY IN FEDERAL EMPLOYMENT ENFORCEMENT FUNCTIONS

(a) All equal opportunity in Federal employment enforcement and related functions vested in the Civil Service Commission pursuant to Section 717(b) and (c) of the Civil Rights Act of 1964, as amended, (42 U.S.C. 2000e-16(b) and (c)), are hereby transferred to the Equal Employment Opportunity Commission.

(b) The Equal Employment Opportunity Commission may delegate to the Civil Service Commission or its successor the function of making a preliminary determination on the issue of discrimination whenever, as a part of a complaint or appeal

before the Civil Service Commission on other grounds, a Federal employee alleges a violation of Section 717 of the Civil Rights Act of 1964, as amended, (42 U.S.C. 2000e-16) provided that the Equal Employment Opportunity Commission retains the function of making the final determination concerning such issue of discrimination.

SEC. 4. TRANSFER OF FEDERAL EMPLOYMENT OF HANDICAPPED INDIVIDUALS ENFORCEMENT FUNCTIONS

All Federal employment of handicapped individuals enforcement functions and related functions vested in the Civil Service Commission pursuant to Section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791) are hereby transferred to the Equal Employment Opportunity Commission. The function of being co-chairman of the Interagency Committee of Handicapped Employees now vested in the Chairman of the Civil Service Commission pursuant to Section 501 is hereby transferred to the Chairman of the Equal Employment Opportunity Commission.

SEC. 5. TRANSFER OF PUBLIC SECTOR 707 FUNCTIONS

Any function of the Equal Employment Opportunity Commission concerning initiation of litigation with respect to State or local government, or political subdivisions under Section 707 of Title VII of the Civil Rights Act of 1964, as amended, (42 U.S.C. 2000e-6) and all necessary functions related thereto, including investigation, findings, notice and an opportunity to resolve the matter without contested litigation, are hereby transferred to the Attorney General, to be exercised by him in accordance with procedures consistent with said Title VII. The Attorney General is authorized to delegate any function under Section 707 of said Title VII to any officer or employee of the Department of Justice.

SEC. 6. TRANSFER OF FUNCTIONS AND ABOLITION OF THE EQUAL EMPLOYMENT OPPORTUNITY COORDINATING COUNCIL

All functions of the Equal Employment Opportunity Coordinating Council, which was established pursuant to Section

715 of the Civil Rights Act of 1964, as amended, (42 U.S.C. 2000e-14), are hereby transferred to the Equal Employment Opportunity Commission. The Equal Employment Opportunity Coordinating Council is hereby abolished.

SECTION 7. SAVINGS PROVISION

Administrative proceedings including administrative appeals from the acts of an executive agency (as defined by Section 105 of Title 5 of the United States Code) commenced or being conducted by or against such executive agency will not abate by reason of the taking effect of this Plan. Consistent with the provisions of this Plan, all such proceedings shall continue before the Equal Employment Opportunity Commission otherwise unaffected by the transfers provided by this Plan. Consistent with the provisions of this Plan, the Equal Employment Opportunity Commission shall accept appeals from those executive agency actions which occurred prior to the effective date of this Plan in accordance with law and regulations in effect on such effective date. Nothing herein shall affect any right of any person to judicial review under applicable law.

SEC. 8. INCIDENTAL TRANSFERS

So much of the personnel, property, records and unexpended balances of appropriations, allocations and other funds employed, used, held, available, or to be made available in connection with the functions transferred under this Plan, as the Director of the Office of Management and Budget shall determine, shall be transferred to the appropriate department, agency, or component at such time or times as the Director of the Office of Management and Budget shall provide, except that no such unexpended balances transferred shall be used for purposes other than those for which the appropriation was originally made. The Director of the Office of Management and Budget shall provide for terminating the affairs of the Council abolished herein and for such further measures and

dispositions as such Director deems necessary to effectuate the purposes of this Reorganization Plan.

SEC. 9. EFFECTIVE DATE

This Reorganization Plan shall become effective at such time or times, on or before October 1, 1979, as the President shall specify, but not sooner than the earliest time allowable under Section 906 of Title 5 of the United States Code.

[Pursuant to Ex. Ord. No. 12106, Dec. 26, 1978, 44 F.R. 1053, the transfer to the Equal Employment Opportunity Commission of certain functions of the Civil Service Commission relating to enforcement of equal employment opportunity programs as provided by sections 1 to 4 of this Reorg. Plan is effective Jan. 1, 1979.]

[Pursuant to Ex. Ord. No. 12144, June 22, 1979, 44 F.R. 37193, sections 1 and 2 of this Reorg. Plan are effective July 1, 1979, except for transfer of functions already effective Jan. 1, 1979, under Ex. Ord. No. 12106 above.]

[Pursuant to Ex. Ord. No. 12068, June 30, 1978, 43 F.R. 28971, section 5 of this Reorg. Plan is effective July 1, 1978.]

[Pursuant to Ex. Ord. No. 12067, June 30, 1978, 43 F.R. 28967, section 6 of this Reorg. Plan is effective July 1, 1978.]

MESSAGE OF THE PRESIDENT

To the Congress of the United States:

I am submitting to you today Reorganization Plan No. 1 of 1978. This Plan makes the Equal Employment Opportunity Commission the principal Federal agency in fair employment enforcement. Together with actions I shall take by Executive Order, it consolidates Federal equal employment opportunity activities and lays, for the first time, the foundation of a unified, coherent Federal structure to combat job discrimination in all its forms.

In 1940 President Roosevelt issued the first Executive Order forbidding discrimination in employment by the Federal government. Since that time the Congress, the courts and the

Executive Branch — spurred by the courage and sacrifice of many people and organizations — have taken historic steps to extend equal employment opportunity protection throughout the private as well as public sector. But each new prohibition against discrimination unfortunately has brought with it a further dispersal of Federal equal employment opportunity responsibility. This fragmentation of authority among a number of Federal agencies has meant confusion and ineffective enforcement for employees, regulatory duplication and needless expense for employers.

Fair employment is too vital for haphazard enforcement. My Administration will aggressively enforce our civil rights laws. Although discrimination in any area has severe consequences, limiting economic opportunity affects access to education, housing and health care. I, therefore, ask you to join with me to reorganize administration of the civil rights laws and to begin that effort by reorganizing the enforcement of those laws which ensure an equal opportunity to a job.

Eighteen government units now exercise important responsibilities under statutes. Executive Orders and regulations relating to equal employment opportunity:

The Equal Employment Opportunity Commission (EEOC) enforces Title VII of the Civil Rights Act of 1964, [section 2000e et seq. of this title] which bans employment discrimination based on race, national origin, sex or religion. The EEOC acts on individual complaints and also initiates private sector cases involving a "pattern or practice" of discrimination.

The Department of Labor and 11 other agencies enforce Executive Order 11246 [set out as a note under section 2000e of this title]. This prohibits discrimination in employment on the basis of race, national origin, sex, or religion and requires affirmative action by government contractors. While the Department now coordinates enforcement of this "contract compliance" program, it is actually administered by eleven other departments and agencies. The Department also administers those statutes requiring contractors to take affirmative

action to employ handicapped people, disabled veterans and Vietnam veterans.

In addition, the Labor Department enforces the Equal Pay Act of 1963 [section 206(d) of Title 29, Labor], which prohibits employers from paying unequal wages based on sex, and the Age Discrimination in Employment Act of 1967 [section 621 et seq. of Title 29], which forbids age discrimination against persons between the ages of 40 and 65.

The Department of Justice litigates Title VII cases involving public sector employers — State and local governments. The Department also represents the Federal government in lawsuits against Federal contractors and grant recipients who are in violation of Federal nondiscrimination prohibitions.

The Civil Service Commission (CSC) enforces Title VII and all other nondiscrimination and affirmative action requirements for Federal employment. The CSC rules on complaints filed by individuals and monitors affirmative action plans submitted annually by other Federal agencies.

The Equal Employment Opportunity Coordinating Council includes representatives from EEOC, Labor, Justice, CSC and the Civil Rights Commission. It is charged with coordinating the Federal equal employment opportunity enforcement effort and with eliminating overlap and inconsistent standards.

In addition to these major government units, other agencies enforce various equal employment opportunity requirements which apply to specific grant programs. The Department of Treasury, for example, administers the anti-discrimination prohibitions applicable to recipients of revenue sharing funds.

These programs have had only limited success. Some of the past deficiencies include:

—inconsistent standards of compliance;

—duplicative, inconsistent paperwork requirements and investigative efforts;

—conflicts within agencies between their program responsibilities and their responsibility to enforce the civil rights laws;

—confusion on the part of workers about how and where to seek redress;

—lack of accountability.

I am proposing today a series of steps to bring coherence to the equal employment enforcement effort. These steps, to be accomplished by the Reorganization Plan and Executive Orders, constitute an important step toward consolidation of equal employment opportunity enforcement. They will be implemented over the next two years, so that the agencies involved may continue their internal reform.

Its experience and broad scope make the EEOC suitable for the role of principal Federal agency in fair employment enforcement. Located in the Executive Branch and responsible to the President, the EEOC has developed considerable expertise in the field of employment discrimination since Congress created it by the Civil Rights Act of 1964 [section 2000e-4 of this title]. The Commission has played a pioneer role in defining both employment discrimination and its appropriate remedies.

While it has had management problems in past administrations, the EEOC's new leadership is making substantial progress in correcting them. In the last seven months the Commission has redesigned its internal structures and adopted proven management techniques. Early experience with these procedures indicates a high degree of success in reducing and expediting new cases. At my direction, the Office of Management and Budget is actively assisting the EEOC to ensure that these reforms continue.

The Reorganization Plan I am submitting will accomplish the following:

On July 1, 1978, abolish the Equal Employment Opportunity Coordinating Council (42 U.S.C. 2000e-14) and transfer its duties to the EEOC (no positions or funds shifted).

On October 1, 1978, shift enforcement of equal employment opportunity for Federal employees from the CSC to the EEOC (100 positions and $6.5 million shifted).

On July 1, 1979, shift responsibility for enforcing both the Equal Pay Act and the Age Discrimination in Employment Act from the Labor Department to the EEOC (198 positions and $5.3 million shifted for Equal Pay; 119 positions and $3.5 million for Age Discrimination).

Clarify the Attorney General's authority to initiate "pattern or practice" suits under Title VII in the public sector.

In addition, I will issue an Executive Order on October 1, 1978, to consolidate the contract compliance program — now the responsibility of Labor and eleven "compliance agencies" — into the Labor Department (1,517 positions and $33.1 million shifted).

These proposed transfers and consolidations reduce from fifteen to three the number of Federal agencies having important equal employment opportunity responsibilities under Title VII of the Civil Rights Act of 1964 and Federal contract compliance provisions.

Each element of my Plan is important to the success of the entire proposal.

By abolishing the Equal Employment Opportunity Coordinating Council and transferring its responsibilities to the EEOC, this plan places the Commission at the center of equal employment opportunity enforcement. With these new responsibilities, the EEOC can give coherence and direction to the government's efforts by developing strong uniform enforcement standards to apply throughout the government: standardized data collection procedures, joint training programs, programs to ensure the sharing of enforcement related data among agencies, and methods and priorities for complaint and compliance reviews. Such direction has been absent in the Equal Employment Opportunity Coordinating Council.

It should be stressed, however, that affected agencies will be consulted before EEOC takes any action. When the Plan has been approved, I intend to issue an Executive Order which will provide for consultation, as well as a procedure for reviewing major disputed issues within the Executive Office of

the President. The Attorney General's responsibility to advise the Executive Branch on legal issues will also be preserved.

Transfer of the Civil Service Commission's equal employment opportunity responsibilities to EEOC is needed to ensure that: (1) Federal employees have the same rights and remedies as those in the private sector and in State and local government; (2) Federal agencies meet the same standards as are required of other employers; and (3) potential conflicts between an agency's equal employment opportunity and personnel management functions are minimized. The Federal government must not fall below the standard of performance it expects of private employers.

The Civil Service Commission has in the past been lethargic in enforcing fair employment requirements within the Federal government. While the Chairman and other Commissioners I have appointed have already demonstrated their personal commitment to expanding equal employment opportunity, responsibility for ensuring fair employment for Federal employees should rest ultimately with the EEOC.

We must ensure that the transfer in no way undermines the important objectives of the comprehensive civil service reorganization which will be submitted to Congress in the near future. When the two plans take effect; I will direct the EEOC and the CSC to coordinate their procedures to prevent any duplication and overlap.

The Equal Pay Act now administered by the Labor Department, prohibits employers from paying unequal wages based on sex. Title VII of the Civil Rights Act, which is enforced by EEOC, contains a broader ban on sex discrimination. The transfer of Equal Pay responsibility from the Labor Department to the EEOC will minimize overlap and centralize enforcement of statutory prohibitions against sex discrimination in employment.

The transfer will strengthen efforts to combat sex discrimination. Such efforts would be enhanced still further by passage of the legislation pending before you, which I support,

that would prohibit employers from excluding women disabled by pregnancy from participating in disability programs.

There is now virtually complete overlap in the employers, labor organizations, and employment agencies covered by Title VII and by the Age Discrimination in Employment Act. This overlap is burdensome to employers and confusing to victims of discrimination. The proposed transfer of the age discrimination program from the Labor Department to the EEOC will eliminate the duplication.

The Plan I am proposing will not affect the Attorney General's responsibility to enforce Title VII against State or local governments or to represent the Federal government in suits against Federal contractors and grant recipients. In 1972, the Congress determined that the Attorney General should be involved in suits against State and local governments. This proposal reinforces that judgment and clarifies the Attorney General's authority to initiate litigation against State or local governments engaged in a "pattern or practice" of discrimination. This in no way diminishes the EEOC's existing authority to investigate complaints filed against State or local governments and, where appropriate, to refer them to the Attorney General. The Justice Department and the EEOC will cooperate so that the Department sues on valid referrals, as well as on its own "pattern or practice" cases.

A critical element of my proposals will be accomplished by Executive Order rather than by the Reorganization Plan. This involves consolidation in the Labor Department of the responsibility to ensure that Federal contractors comply with Executive Order 11246. Consolidation will achieve the following: promote consistent standards, procedures, and reporting requirements; remove contractors from the jurisdiction of multiple agencies; present an agency's equal employment objectives from being outweighed by its procurement and construction objectives; and produce more effective law enforcement through unification of planning, training and sanctions. By 1981, after I have had an opportunity to review the manner in

which both the EEOC and the Labor Department are exercising their new responsibilities, I will determine whether further action is appropriate.

Finally, the responsibility for enforcing grant-related equal employment provisions will remain with the agencies administering the grant programs. With the EEOC acting as coordinator of Federal equal employment programs, we will be able to bring overlap and duplication to a minimum. We will be able, for example, to see that a university's employment practices are not subject to duplicative investigations under both Title IX of the Education Amendments of 1972 [section 1681 et seq. of Title 20, Education] and the contract compliance program. Because of the similarities between the Executive Order program and those statutes requiring Federal contractors to take affirmative action to employ handicapped individuals and disabled and Vietnam veterans, I have determined that enforcement of these statues should remain in the Labor Department.

Each of the changes set forth in the Reorganization Plan accompanying this message is necessary to accomplish one or more of the purposes set forth in Section 901(a) of Title 5 of the United States Code. I have taken care to determine that all functions abolished by the Plan are done only under the statutory authority provided by Section 903(b) of Title 5 of the United States Code.

I do not anticipate that the reorganizations contained in this Plan will result in any significant change in expenditures. They will result in a more efficient and manageable enforcement program.

The Plan I am submitting is moderate and measured. It gives the Equal Employment Opportunity Commission — an agency dedicated solely to this purpose — the primary Federal responsibility in the area of job discrimination, but it is designed to give this agency sufficient time to absorb its new responsibilities. This reorganization will produce consistent agency standards, as well as increased accountability. Com-

bined with the intense commitment of those charged with these responsibilities, it will become possible for us to accelerate this nation's progress in ensuring equal job opportunities for all our people.

JIMMY CARTER.

THE WHITE HOUSE, February 23, 1978.

EX. ORD. NO. 12106. TRANSFER OF CERTAIN EQUAL EMPLOYMENT ENFORCEMENT FUNCTIONS

Ex. Ord. No. 12106, Dec. 26, 1978, 44 F.R. 1053, provided:

By the authority vested in me as President of the United States of America by Section 9 of Reorganization Plan No. 1 of 1978 (43 FR 19807) [set out above], in order to effectuate the transfer of certain functions relating to the enforcement of equal employment programs, and in order to make certain technical amendments in other Orders to reflect this transfer of functions, it is hereby ordered as follows:

1-101. The transfer to the Equal Employment Opportunity Commission of certain functions of the Civil Service Commission, relating to enforcement of equal employment opportunity programs as provided by Sections 1, 2, 3 and 4 of Reorganization Plan No. 1 of 1978 (43 FR 19807) shall be effective on January 1, 1979.

1-102. Executive Order No. 11478, as amended [set out as a note under section 2000e of this title], is further amended by deleting the preamble, by substituting "national origin, handicap, or age" for "or national origin" in the first sentence of Section 1, and revising Sections 3, 4, and 5 to read as follows:

"SEC. 3. The Equal Employment Opportunity Commission shall be responsible for directing and furthering the implementation of the policy of the Government of the United States to provide equal opportunity in Federal employment for all employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) and to prohibit discrimination in employment because of race, color, religion, sex, national origin, handicap, or age.

"SEC. 4. The Equal Employment Opportunity Commission, after consultation with all affected departments and agencies, shall issue such rules, regulations, orders, and instructions and request such information from the affected departments and agencies as it deems necessary and appropriate to carry out this Order.

"SEC. 5. All departments and agencies shall cooperate with and assist the Equal Employment Opportunity Commission in the performance of its functions under this Order and shall furnish the Commission such reports and information as it may request. The head of each department or agency shall comply with rules, regulations, orders and instructions issued by the Equal Employment Opportunity Commission pursuant to Section 4 of this Order."

1-103. Executive Order No. 11022, as amended [set out as a note under section 3001 of this title], is further amended by revising Section 1(b) to read as follows:

"(b) The Council shall be composed of the Secretary of Health, Education, and Welfare [now Health and Human Services), who shall be Chairman, the Secretary of the Treasury, the Secretary of Agriculture, the Secretary of Commerce, the Secretary of Labor, the Secretary of Housing and Urban Development, the Secretary of Transportation, the Administrator of Veterans Affairs, the Director of the Office of Personnel Management, the Director of the Community Services Administration, and the Chairman of the Equal Employment Opportunity Commission."

1-104. Executive Order No. 11480 of September 9, 1969 [set out as a note under section 791 of Title 29, Labor], is amended by deleting "and the Chairman of the United States Civil Service Commission" in Section 4 and substituting therefor "Director of the Office of Personnel Management, and the Chairman of the Equal Employment Opportunity Commission".

1-105. Executive Order No. 11830 of January 9, 1975 [set out as a note under section 791 of Title 29, Labor], is amended by deleting Section 2 and revising Section 1 to read as follows:

"In accord with Section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791) and Section 4 of Reorganization Plan No. 1 of 1978 (43 FR 19808) the Interagency Committee on Handicapped Employees is enlarged and composed of the following, or their designees whose positions are Executive level IV or higher:

"(1) Secretary of Defense.

"(2) Secretary of Labor.

"(3) Secretary of Health, Education, and Welfare [now Health and Human Services], Co-Chairman.

"(4) Director of the Office of Personnel Management.

"(5) Administrator of Veterans Affairs.

"(6) Administrator of General Services.

"(7) Chairman of the Federal Communications Commission.

"(8) Chairman of the Equal Employment Opportunity Commission, Co-Chairman.

"(9) Such other members as the President may designate."

1-106. This Order shall be effective on January 1, 1979.

JIMMY CARTER.

EX. ORD. NO. 12144. TRANSFER OF CERTAIN EQUAL PAY AND AGE DISCRIMINATION IN EMPLOYMENT ENFORCEMENT FUNCTIONS

Ex. Ord. No. 12144, June 22, 1979, 44 F.R. 37193, provided,

By the authority vested in me as President of the United States of America by the Constitution and laws of the United States, including Section 9 of Reorganization Plan No. 1 of 1978 (43 FR 19807) [set out as a note above], in order to effectuate the transfer of certain functions relating to the enforcement of equal pay and age discrimination in employment programs from the Department of Labor to the Equal Employment Opportunity Commission, it is hereby ordered as follows:

1-101. Sections 1 and 2 of Reorganization Plan No. 1 of 1978 (43 FR 19807) [set out as a note above] shall become effective on July 1, 1979, with the exception of the transfer of functions from the Civil Service Commission, already effective January 1, 1979 (Executive Order No. 12106 [set out as a note above]).

1-102. The records, property, personnel and positions, and unexpended balances of appropriations or funds, available or to be made available, which relate to the functions transferred as provided in this Order are hereby transferred from the Department of Labor to the Equal Employment Opportunity Commission.

1-103. The Director of the Office of Management and Budget shall make such determinations, issue such Orders, and take all actions necessary or appropriate to effectuate the transfers provided in this Order, including the transfer of funds, records, property, and personnel.

1-104. This Order shall be effective July 1, 1979.

JIMMY CARTER.

CROSS REFERENCES

Per diem and mileage of witnesses, see section 1821 et seq. of Title 28, Judiciary and Judicial Procedure.

§ 2000e-5. Enforcement provisions

(a) Power of Commission to prevent unlawful employment practices

The Commission is empowered, as hereinafter provided, to prevent any person from engaging in any unlawful employment practice as set forth in section 2000e-2 or 2000e-3 of this title.

(b) Charges by persons aggrieved or member of Commission of unlawful employment practices by employers, etc.; filing; allegations; notice to respondent; contents of notice; investigation by Commission; contents of charges; prohibition on disclosure of charges; determination of reasonable cause; conference, conciliation, and persuasion for elimination of unlawful practices; prohibition on disclosure of informal endeavors to end unlawful practices; use of evidence in subsequent proceedings; penalties for disclosure of information; time for determination of reasonable cause

Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer, employment agency, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on such employer, employment agency, labor organization, or joint labor-management committee (hereinafter referred to as the "respondent") within ten days, and shall make an investigation thereof. Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires. Charges shall not be made public by the Commission. If the Commission determines after such investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of its action. In determining whether reasonable cause exists, the Commission shall accord substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State or local law pursuant to the requirements of subsections (c) and (d) of this section. If the Commis-

sion determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned. Any person who makes public information in violation of this subsection shall be fined not more than $1,000 or imprisoned for not more than one year, or both. The Commission shall make its determination on reasonable cause as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge or, where applicable under subsection (c) or (d) of this section, from the date upon which the Commission is authorized to take action with respect to the charge.

(c) State or local enforcement proceedings; notification of State or local authority; time for filing charges with Commission; commencement of proceedings

In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (a)[1] of this section by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated, provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State or local law. If any

[1] So in original. Probably should be subsection "(b)".

requirement for the commencement of such proceedings is imposed by a State or local authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State or local authority.

(d) State or local enforcement proceedings; notification of State or local authority; time for action on charges by Commission

In the case of any charge filed by a member of the Commission alleging an unlawful employment practice occurring in a State or political subdivision of a State which has a State or local law prohibiting the practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, the Commission shall, before taking any action with respect to such charge, notify the appropriate State or local officials and, upon request, afford them a reasonable time, but not less than sixty days (provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective day of such State or local law), unless a shorter period is requested, to act under such State or local law to remedy the practice alleged.

(e) Time for filing charges; time for service of notice of charge on respondent; filing of charge by Commission with State or local agency

A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment

practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

(f) Civil action by Commission, Attorney General, or person aggrieved; preconditions; procedure; appointment of attorney; payment of fees, costs, or security; intervention; stay of Federal proceedings; action for appropriate temporary or preliminary relief pending final disposition of charge; jurisdiction and venue of United States courts; designation of judge to hear and determine case; assignment of case for hearing; expedition of case; appointment of master

(1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d) of this section, the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Com-

mission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision. If a charge filed with the Commission pursuant to subsection (b) of this section, is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d) of this section, whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, to intervene in such civil action upon certification that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings de-

scribed in subsection (c) or (d) of this section or further efforts of the Commission to obtain voluntary compliance.

(2) Whether a charge is filed with the Commission and the Commission concludes on the basis of a preliminary investigation that prompt judicial action is necessary to carry out the purposes of this Act, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, may bring an action for appropriate temporary or preliminary relief pending final disposition of such charge. Any temporary restraining order or other order granting preliminary or temporary relief shall be issued in accordance with rule 65 of the Federal Rules of Civil Procedure. It shall be the duty of a court having jurisdiction over proceedings under this section to assign cases for hearing at the earliest practicable date and to cause such cases to be in every way expedited.

(3) Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this subchapter. Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office. For purposes of sections 1404 and 1406 of title 28, the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the action might have been brought.

(4) It shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the dis-

trict is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

(5) It shall be the duty of the judge designated pursuant to this subsection to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited. If such judge has not scheduled the case for trial within one hundred and twenty days after issue has been joined, that judge may appoint a master pursuant to rule 53 of the Federal Rules of Civil Procedure.

(g) Injunctions; appropriate affirmative action; equitable relief; accrual of back pay; reduction of back pay; limitations on judicial orders

If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an em-

ployee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title.

(h) Provisions of chapter 6 of title 29 not applicable to civil actions for prevention of unlawful practices

The provisions of chapter 6 of title 29 shall not apply with respect to civil actions brought under this section.

(i) Proceedings by Commission to compel compliance with judicial orders

In any case in which an employer, employment agency, or labor organization fails to comply with an order of a court issued in a civil action brought under this section, the Commission may commence proceedings to compel compliance with such order.

(j) Appeals

Any civil action brought under this section and any proceedings brought under subsection (i) of this section shall be subject to appeal as provided in sections 1291 and 1292, title 28.

(k) Attorney's fee; liability of Commission and United States for costs

In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

(Pub. L. 88-352, title VII, § 706, July 2, 1964, 78 Stat. 259; Pub. L. 92-261, § 4, Mar. 24, 1972, 86 Stat. 104.)

REFERENCES IN TEXT

This Act, referred to in subsec. (f)(2), means Pub. L. 88-352, July 2, 1964, 78 Stat. 241, as amended, known as the Civil Rights Act of 1964, which is classified principally to subchapters II to IX of this chapter (§ 2000a et seq.). For complete classification of this Act to the code, see Short Title note set out under section 2000a of this title and Tables.

Rules 65 and 53 of the Federal Rules of Civil Procedure, referred to in subsec. (f)(2) and (5), are set out in the Appendix to Title 28, Judiciary and Judicial Procedure.

Chapter 6 (§ 101 et seq.) of title 29, referred to in subsec. (h), is a reference to act Mar. 23, 1932, ch. 90, 47 Stat. 70, as amended, popularly known as the Norris-LaGuardia Act. For complete classification of this Act to the code, see Tables.

AMENDMENTS

1972 — Subsec. (a), Pub. L. 92-261, § 4(a), added subsec. (a). Former subsec. (a) was redesignated (b) and generally amended.

Subsec. (b), Pub. L. 92-261, § 4(a), redesignated former subsec. (a) as (b) and, as so redesignated, modified the procedure for the filing and consideration of charges by the Commission, subjected to coverage unlawful practices or joint labor-management committees controlling apprenticeship or other training or retraining, including on-the-job training programs, required the Commission to accord substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State or local law in its determination of reasonable cause, and added the provision setting forth the time period, after charges have been filed, allowed to the Commission to determine reasonable cause. Former subsec. (b) was redesignated (c).

(b) Jurisdiction; three-judge district court for cases of general public importance; hearing, determination, expedition of action, review by Supreme Court; single judge district court; hearing, determination, expedition of action

The district courts of the United States shall have and shall exercise jurisdiction of proceedings instituted pursuant to this section, and in any such proceeding the Attorney General may file with the clerk of such court a request that a court of three judges be convened to hear and determine the case. Such request by the Attorney General shall be accompanied by a certificate that, in his opinion, the case is of general public importance. A copy of the certificate and request for a three-judge court shall be immediately furnished by such clerk to the chief judge of the circuit (or in his absence, the presiding circuit judge of the circuit) in which the case is pending. Upon receipt of such request it shall be the duty of the chief judge of the circuit or the presiding circuit judge, as the case may be, to designate immediately three judges in such circuit, of whom at least one shall be a circuit judge and another of whom shall be a district judge of the court in which the proceeding was instituted, to hear and determine such case, and it shall be the duty of the judges so designated to assign the case for hearing at the earliest practicable date, to participate in the hearing and determination thereof, and to cause the case to be in every way expedited. An appeal from the final judgment of such court will lie to the Supreme Court.

In the event the Attorney General fails to file such a request in any such proceeding, it shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall

then designate a district or circuit judge of the circuit to hear and determine the case.

It shall be the duty of the judge designated pursuant to this section to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited.

(C) Transfer of functions, etc., to Commission; effective date; prerequisite to transfer; execution of functions by Commission

Effective two years after March 24, 1972, the functions of the Attorney General under this section shall be transferred to the Commission, together with such personnel, property, records, and unexpended balances of appropriations, allocations, and other funds employed, used, held, available, or to be made available in connection with such functions unless the President submits, and neither House of Congress vetoes, a reorganization plan pursuant to chapter 9 of title 5, inconsistent with the provisions of this subsection. The Commission shall carry out such functions in accordance with subsections (d) and (e) of this section.

(d) Transfer of functions, etc., not to affect suits commenced pursuant to this section prior to date of transfer

Upon the transfer of functions provided for in subsection (c) of this section, in all suits commenced pursuant to this section prior to the date of such transfer, proceedings shall continue without abatement, all court orders and decrees shall remain in effect, and the Commission shall be substituted as a party for the United States of America, the Attorney General, or the Acting Attorney General, as appropriate.

(e) Investigation and action by Commission pursuant to filing of charge of discrimination; procedure

Subsequent to March 24, 1972, the Commission shall have authority to investigate and act on a charge of a pattern or practice of discrimination, whether filed by or on behalf of a person claiming to be aggrieved or by a member of the Commission. All such actions shall be conducted in accordance with the procedures set forth in section 2000e-5 of this title. (Pub. L. 88-352, title VII, § 707, July 2, 1964, 78 Stat. 261; Pub. L. 92-261, § 5, Mar. 24, 1972, 86 Stat. 107.)

AMENDMENTS

1972 — Subsecs. (c) to (e). Pub. L. 92-261 added subsecs. (c) to (e).

TRANSFER OF FUNCTIONS

Any function of the Equal Employment Opportunity Commission concerning initiation of litigation with respect to State or local government, or political subdivisions under this section, and all necessary functions related thereto, including investigation, findings, notice and an opportunity to resolve the matter without contested litigation, were transferred to the Attorney General, to be exercised by him in accordance with procedures consistent with this subchapter, and with the Attorney General authorized to delegate any function under this section to any officer or employee of the Department of Justice, by Reorg. Plan No. 1 of 1978, § 5, 43 F.R. 19807, 92 Stat. 3781, set out as a note under section 2000e-4 of this title.

EX. ORD. NO. 12068. TRANSFER OF CERTAIN FUNCTIONS TO ATTORNEY GENERAL

Ex. Ord. No. 12068, June 30, 1978, 43 F.R. 28971, provided:

By virtue of the authority vested in me as President of the United States by the Constitution and laws of the United

States, including Section 9 of Reorganization Plan Number 1 of 1978 (43 FR 19807) [set out as a note under section 2000e-4 of this title], in order to clarify the Attorney General's authority to initiate public sector litigation under Section 707 of Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. 2000e-6), it is ordered as follows:

1-1. Section 707 Functions of the Attorney General

1-101. Section 5 of Reorganization Plan Number 1 of 1978 (43 FR 19807) [set out as a note under section 2000e-4 of this title] shall become effective on July 1, 1978.

1-102. The functions transferred to the Attorney General by Section 5 of Reorganization Plan Number 1 of 1978 [set out as a note under section 2000e-4 of this title] shall, consistent with Section 707 of Title VII of the Civil Rights Act of 1964, as amended [this section], be performed in accordance with Department of Justice procedures heretofore followed under Section 707.

Jimmy Carter.

Section Referred to in Other Sections

This section is referred to in section 2000e-4 of this title.

§ 2000e-7. Effect on State laws

Nothing in this subchapter shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a state, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this subchapter.

(Pub. L. 88-352, title VII, § 708, July 2, 1964, 78 Stat. 262).

§ 2000e-8. Investigations

(a) Examination and copying of evidence related to unlawful employment practices

In connection with any investigation of a charge filed under section 2000e-5 of this title, the Commission or its designated representative shall at all reasonable times have access to, for the purposes of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to unlawful employment practices covered by this subchapter and is relevant to the charge under investigation.

(b) Cooperation with State and local agencies administering State fair employment practices laws; participation in and contribution to research and other projects; utilization of services; payment in advance or reimbursement; agreements and rescission of agreements

The Commission may cooperate with State and local agencies charged with the administration of State fair employment practices laws and, with the consent of such agencies, may, for the purpose of carrying out its functions and duties under this subchapter and within the limitation of funds appropriated specifically for such purpose, engage in and contribute to the cost of research and other projects of mutual interest undertaken by such agencies, and utilize the services of such agencies and their employees, and, notwithstanding any other provision of law, pay by advance or reimbursement such agencies and their employees for services rendered to assist the Commission in carrying out this subchapter. In furtherance of such cooperative efforts, the Commission may enter into written agreements with such State or local agencies and such agreements may include provisions under which the Commission shall refrain from processing a charge in any cases or class of cases specified in such agreements or under which the Com-

mission shall relieve any person or class of persons in such State or locality from requirements imposed under this section. The Commission shall rescind any such agreement whenever it determines that the agreement no longer serves the interest of effective enforcement of this subchapter.

(c) **Execution, retention, and preservation of records; reports to Commission; training program records; appropriate relief from regulation or order for undue hardship; procedure for exemption; judicial action to compel compliance**

Every employer, employment agency, and labor organization subject to this subchapter shall (1) make and keep such records relevant to the determinations of whether unlawful employment practices have been or are being committed, (2) preserve such records for such periods, and (3) make such reports therefrom as the Commission shall prescribe by regulation or order, after public hearing, as reasonable, necessary, or appropriate for the enforcement of this subchapter or the regulations or orders thereunder. The Commission shall, by regulation, require each employer, labor organization, and joint labor-management committee subject to this subchapter which controls an apprenticeship or other training program to maintain such records as are reasonably necessary to carry out the purposes of this subchapter, including, but not limited to, a list of applicants who wish to participate in such program, including the chronological order in which applications were received, and to furnish to the Commission upon request, a detailed description of the manner in which persons are selected to participate in the apprenticeship or other training program. Any employer, employment agency, labor organization, or joint labor-management committee which believes that the application to it of any regulation or order issued under this section would result in undue hardship may apply to the Commission for an exemption from the application of such regulation or order, and, if such application for an ex-

emption is denied, bring a civil action in the United States district court for the district where such records are kept. If the Commission or the court, as the case may be, finds that the application of the regulation or order to the employer, employment agency, or labor organization in question would impose an undue hardship, the Commission or the court, as the case may be, may grant appropriate relief. If any person required to comply with the provisions of this subsection fails or refuses to do so, the United States district court for the district in which such person is found, resides, or transacts business, shall, upon application of the Commission, or the Attorney General in a case involving a government, governmental agency or political subdivision, have jurisdiction to issue to such person an order requiring him to comply.

(d) Consultation and coordination between Commission and interested State and Federal agencies in prescribing recordkeeping and reporting requirements; availability of information furnished pursuant to recordkeeping and reporting requirements; conditions on availability

In prescribing requirements pursuant to subsection (c) of this section, the Commission shall consult with other interested State and Federal agencies and shall endeavor to coordinate its requirements with those adopted by such agencies. The Commission shall furnish upon request and without cost to any State or local agency charged with the administration of a fair employment practice law information obtained pursuant to subsection (c) of this section from any employer, employment agency, labor organization, or joint labor-management committee subject to the jurisdiction of such agency. Such information shall be furnished on condition that it not be made public by the recipient agency prior to the institution of a proceeding under State or local law involving such information. If this condition is violated by a recipient agency, the Commission may decline to honor subsequent requests pursuant to this subsection.

(e) Prohibited disclosures; penalties

It shall be unlawful for any officer or employee of the Commission to make public in any manner whatever any information obtained by the Commission pursuant to its authority under this section prior to the institution of any proceeding under this subchapter involving such information. Any officer or employee of the Commission who shall make public in any manner whatever any information in violation of this subsection shall be guilty, of a misdemeanor and upon conviction thereof, shall be fined not more than $1,000, or imprisoned not more than one year.
(Pub. L. 88-352, title VII, § 709, July 2, 1964, 78 Stat. 262; Pub. L. 92-261, § 6, Mar. 24, 1972, 86 Stat. 107.)

AMENDMENTS

1972 — Subsec. (b), Pub. L. 92-261 added provisions authorizing the Commission to engage in and contribute to the cost of research and other projects undertaken by State and local agencies and provisions authorizing the Commission to make advance payments to State and local agencies and their employees for services rendered to the Commission, and struck out provisions relating to agreements between the Commission and State and local agencies prohibiting private civil actions under section 2000e-5 of this title in specified cases.

Subsec. (c), Pub. L. 92-261 struck out "Except as provided in subsection (d) of this section," preceding "every employer, employment agency, and labor organization subject to this subchapter shall (1)", required the party seeking an exemption to bring an action in the district court only after the Commission denied the application for the exemption, and added the provision which authorized the Commission, or the Attorney General in a case involving a government, etc., to apply for a court order compelling compliance with the recordkeeping and reporting obligations set out in this subsection.

Subsec. (d), Pub. L. 92-261 substituted provisions requiring consultation and coordination between Federal and State agencies in prescribing recordkeeping and reporting requirements pursuant to subsec. (c) of this section, and authorizing the Commission to furnish information obtained pursuant to subsec. (c) of this section to interested State and local agencies, for provisions exempting from recordkeeping and reporting requirements employers, etc., required to keep records and make reports under State or local fair employment practice laws, except for the maintenance of notations by such employers, etc., which reflect the differences in coverage or enforcement between State or local laws and the provisions of this subchapter, and dispensing with recordkeeping and reporting requirements where the employer reports under some Executive Order prescribing fair employment practices for Government contractors or subcontractors.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 2000e-9 of this title.

§ 2000e-9. Conduct of hearing and investigations pursuant to section 161 of title 29

For the purpose of all hearings and investigations conducted by the Commission or its duly authorized agents or agencies, section 161 of title 29 shall apply.

(Pub. L. 88-352, title VII, § 710, July 2, 1964, 78 Stat. 264; Pub. L. 92-261, § 7, Mar. 24, 1972, 86 Stat. 109.)

AMENDMENTS

1972 — Pub. L. 92-261 substituted provisions making applicable section 161 of title 29 to all hearings and investigations conducted by the Commission or its authorized agents or agencies, for provisions enumerating the investigatory powers of the Commission and the procedure for their enforcement.

§ 2000e-10. Posting of notices; penalties

(a) Every employer, employment agency, and labor organization, as the case may be, shall post and keep posted in conspicuous places upon its premises where notices to employees, applicants for employment, and members are customarily posted a notice to be prepared or approved by the Commission setting forth excerpts, from or, summaries of, the pertinent provisions of this subchapter and information pertinent to the filing of a complaint.

(b) A willful violation of this section shall be punishable by a fine of not more than $100 for each separate offense.
(Pub. L. 88-352, title VII, § 711, July 2, 1964, 78 Stat. 265.)

§ 2000e-11. Veterans' special rights or preference

Nothing contained in this subchapter shall be construed to repeal or modify any Federal, State, territorial, or local law creating special rights or preference for veterans.
(Pub. L. 88-352, title VII, § 712, July 2, 1964, 78 Stat. 265.)

§ 2000e-12. Regulations; conformity of regulations with administrative procedure provisions; reliance on interpretations and instructions of Commission

(a) The Commission shall have authority from time to time to issue, amend, or rescind suitable procedural regulations to carry out the provisions of this subchapter. Regulations issued under this section shall be in conformity with the standards and limitations of subchapter II of chapter 5 of title 5.

(b) In any action or proceeding based on any alleged unlawful employment practice, no person shall be subject to any liability or punishment for or on account of (1) the commission by such person of an unlawful employment practice if he pleads and proves that the act or omission complained of was in good faith, in conformity with, and in reliance on any writ-

ten interpretation or opinion of the Commission, or (2) the failure of such person to publish and file any information required by any provision of this subchapter if he pleads and proves that he failed to publish and file such information in good faith, in conformity with the instructions of the Commission issued under this subchapter regarding the filing of such information. Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that (A) after such act or omission, such interpretation or opinion is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect, or (B) after publishing or filing is determined by judicial authority not to be in conformity with the requirements of this subchapter.
(Pub L. 88-352, title VII, § 713, July 2, 1964, 78 Stat. 265.)

CODIFICATION

In subsec. (a), "subchapter II of chapter 5 of title 5" was substituted for "the Administrative Procedure Act" on authority of Pub. L. 89-554, § 7(b), Sept. 6, 1966, 80 Stat. 631, the first section of which enacted Title 5, Government Organization and Employees.

§ 2000e-13. Application to personnel of Commission of sections 111 and 1114 of title 18; punishment for violation of section 1114 of title 18

The provisions of sections 111 and 1114, title 18, shall apply to officers, agents, and employees of the Commission in the performance of their official duties. Notwithstanding the provisions of sections 111 and 1114 of title 18, whoever in violation of the provisions of section 1114 of such title kills a person while engaged in or on account of the performance of his official functions under this Act shall be punished by imprisonment for any term of years or for life.
(Pub. L. 88-352, title VII, § 714, July 2, 1964, 78 Stat. 265; Pub. L. 92-261, 8(g), Mar. 24, 1972, 86 Stat. 110.)

REFERENCES IN TEXT

This Act, referred to in text, means Pub. L. 88-352, July 2, 1964, 78 Stat. 241, as amended, known as the Civil Rights Act of 1964, which is classified principally to subchapters II to IX of this chapter (§ 2000a et seq.). For complete classification of this Act to the Code, see Short Title note set out under section 2000a of this title and Tables.

AMENDMENTS

1972 — Pub. L. 92-261 added provisions which made section 1114 of title 18 applicable to officers, etc., of the Commission and set forth punishment for violation of such section 1114.

§ 2000e-14. Equal Employment Opportunity Coordinating Council; establishment; composition; duties; report to President and Congress

The Equal Employment Opportunity Commission shall have the responsibility for developing and implementing agreements, policies and practices designed to maximize effort, promote efficiency, and eliminate conflict, competition, duplication and inconsistency among the operations, functions and jurisdictions of the various departments, agencies and branches of the Federal Government responsible for the implementation and enforcement of equal employment opportunity legislation, orders, and policies. On or before October 1 of each year, the Equal Employment Opportunity Commission shall transmit to the President and to the Congress a report of its activities, together with such recommendations for legislative or administrative changes as it concludes are desirable to further promote the purposes of this section. (Pub. L. 88-352, title VII, § 715, July 2, 1964, 78 Stat. 265; Pub. L. 92-261, § 0, Mar. 24, 1972, 86 Stat. 111; Pub. L. 94-273, § 3(24), Apr. 21, 1976, 90 Stat. 377; 1978 Reorg. Plan No. 1, § 6, eff. July 1, 1978, 43 F.R. 19807, 92 Stat. 3781.)

CODIFICATION

The first sentence of this section, which read "There shall be established an Equal Employment Opportunity Coordinating Council (hereinafter referred to in this section as the Council) composed of the Secretary of Labor, the Chairman of the Equal Employment Opportunity Commission, the Attorney General, the Chairman of the United States Civil Service Commission, and the Chairman of the United States Civil Rights Commission, or their respective delegates" was omitted pursuant to Reorg. Plan No. 1 of 1978, § 6, 43 F.R. 19807, 92 Stat. 3781, set out as a note under section 2000e-4 of this title, which abolished the Equal Employment Opportunity Coordinating Council, effective July 1, 1978, as provided by section 1-101 of Ex. Ord. No. 12067, June 30, 1978, 43 F.R. 28967, set out as a note under section 2000e of this title. See Transfer of Functions note set out below.

AMENDMENTS

1976 — Pub. L. 94-273 substituted "October" for "July".

1972 — Pub. L. 92-261 substituted provisions which established the Equal Employment Opportunity Coordinating Council and set forth the composition, powers, and duties of the Council for provisions which directed the Secretary of Labor to make a report to the Congress not later than June 30, 1965 concerning discrimination in employment because of age.

TRANSFER OF FUNCTIONS

"Equal Employment Opportunity Commission" was substituted for "Council", meaning the Equal Employment Opportunity Coordinating Council, in text pursuant to Reorg. Plan No. 1 of 1978, § 6, 43 F.R. 19807, 92 Stat. 3781, set out as a note under section 2000e-4 of this title, which abolished the Equal Employment Opportunity Coordinating Council and transferred its functions to the Equal Employment Opportunity Commission, effective July 1, 1978, as provided by section

1-101 of Ex. Ord. No. 12067, June 30, 1978, 43 F.R. 28967, set out as a note under section 2000e of this title.

SUBMISSION OF SPECIFIC LEGISLATIVE RECOMMENDATIONS TO CONGRESS BY JANUARY 1, 1967, TO IMPLEMENT REPORT ON AGE DISCRIMINATION

Pub. L. 89-601, title VI, § 606, Sept. 23, 1966, 80 Stat. 845, directed the Secretary of Labor to submit to the Congress not later than Jan. 1, 1967 his specific legislative recommendations for implementing the conclusions and recommendations contained in his report on age discrimination in employment made pursuant to provisions of this section prior to its amendment in 1972.

§ 2000e-15. Presidential conferences; acquaintance of leadership with provisions for employment rights and obligations; plans for fair administration; membership

The President shall, as soon as feasible after July 2, 1964, convene one or more conferences for the purpose of enabling the leaders of groups whose members will be affected by this subchapter to become familiar with the rights afforded and obligations imposed by its provisions, and for the purpose of making plans which will result in the fair and effective administration of this subchapter when all of its provisions become effective. The President shall invite the participation in such conference or conferences of (1) the members of the President's Committee on Equal Employment Opportunity, (2) the members of the Commission on Civil Rights, (3) representatives of State and local agencies engaged in furthering equal employment opportunity, (4) representatives of private agencies engaged in furthering equal employment opportunity, and (5) representatives of employers, labor organizations, and employment agencies who will be subject to this subchapter. (Pub. L. 88-352, title VII, § 716(c), July 2, 1964, 78 Stat. 266.)

EXECUTIVE ORDER No. 11197

Ex. Ord. No. 11197, eff. Feb. 5, 1965, 30 F.R. 1721, which established the President's Council on Equal Opportunity, was revoked by Ex. Ord. No. 11247, eff. Sept. 24, 1965, 30 F.R. 12327, formerly set out as a note under section 2000d-1 of this title.

§ 2000e-16. Employment by Federal Government

(a) Discriminatory practices prohibited; employees or applicants for employment subject to coverage

All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of title 5, in executive agencies as defined in section 105 of title 5 (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units of the Government of the District of Columbia having positions in the competitive service, and in those units of the legislative and judicial branches of the Federal Government having positions in the competitive service, and in the Library of Congress shall be made free from any discrimination based on race, color, religion, sex, or national origin.

(b) Equal Employment Opportunity Commission; enforcement powers; issuance of rules, regulations, etc.; annual review and approval of national and regional equal employment opportunity plans; review and evaluation of equal employment opportunity programs and publication of progress reports; consultations with interested parties; compliance with rules, regulations, etc.; contents of national and regional equal employment opportunity plans; authority of Librarian of Congress

Except as otherwise provided in this subsection, the Equal Employment Opportunity Commission shall have authority to

enforce the provisions of subsection (a) of this section through appropriate remedies, including reinstatement or hiring of employees with or without back pay, as will effectuate the policies of this section, and shall issue such rules, regulations, orders and instructions as it deems necessary and appropriate to carry out its responsibilities under this section. The Equal Employment Opportunity Commission shall —

(1) be responsible for the annual review and approval of a national and regional equal employment opportunity plan which each department and agency and each appropriate unit referred to in subsection (a) of this section shall submit in order to maintain an affirmative program of equal employment opportunity for all such employees and applicants for employment;

(2) be responsible for the review and evaluation of the operation of all agency equal employment opportunity programs, periodically obtaining and publishing (on at least a semi-annual basis) progress reports from each such department, agency, or unit; and

(3) consult with and solicit the recommendations of interested individuals, groups, and organizations relating to equal employment opportunity.

The head of each such department, agency, or unit shall comply with such rules, regulations, orders, and instructions which shall include a provision that an employee or applicant for employment shall be notified of any final action taken on any complaint of discrimination filed by him thereunder. The plan submitted by each department, agency, and unit shall include, but not be limited to —

(1) provision for the establishment of training and education programs designed to provide a maximum opportunity for employees to advance so as to perform at their highest potential; and

(2) a description of the qualifications in terms of training and experience relating to equal employment opportunity for the principal and operating officials of each such department, agency, or unit responsible for carrying out the equal employment opportunity program and of the allocation of personnel and resources proposal by such department, agency, or unit to carry out its equal employment opportunity program.

With respect to employment in the Library of Congress, authorities granted in this subsection to the Equal Employment Opportunity Commission shall be exercised by the Librarian of Congress.

(c) **Civil action by employee or applicant for employment for redress of grievances; time for bringing of action; head of department, agency, or unit as defendant**

Within thirty days of receipt of notice of final action taken by a department, agency, or unit referred to in subsection (a) of this section, or by the Equal Employment Opportunity Commission upon an appeal from a decision or order of such department, agency, or unit on a complaint of discrimination based on race, color, religion, sex or national origin, brought pursuant to subsection (a) of this section, Executive Order 11478 or any succeeding Executive Orders, or after one hundred and eighty days from the filing of the initial charge with the department, agency, or unit or with the Equal Employment Opportunity Commission on appeal from a decision or order of such department, agency, or unit until such time as final action may be taken by a department, agency, or unit, an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 2000e-5 of this title, in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant.

(d) Section 2000e-5(f) through (k) of this title applicable to civil actions

The provisions of section 2000e-5(f) through (k) of this title, as applicable, shall govern civil actions brought hereunder.

(e) Government agency or official not relieved of responsibility to assure nondiscrimination in employment or equal employment opportunity

Nothing contained in this Act shall relieve any Government agency or official of its or his primary responsibility to assure nondiscrimination in employment as required by the Constitution and statutes or of its or his responsibilities under Executive Order 11478 relating to equal employment opportunity in the Federal Government.

(Pub. L. 88-352, title VII, § 717, as added Pub. L. 92-261, § 11, Mar. 24, 1972, 86 Stat. 111, and amended 1978 Reorg. Plan No. 1, § 3, eff. Jan. 1, 1979, 43 F.R. 19807, 92 Stat. 3781; Pub. L. 96-191, § 8(g), Feb. 15, 1980, 94 Stat. 34.)

REFERENCES IN TEXT

This Act, referred to in subsec. (e), means Pub. L. 88-352, July 2, 1964, 78 Stat. 241, as amended, known as the Civil Rights Act of 1964, which is classified principally to subchapters II to IX of this chapter (§ 2000a et seq.). For complete classification of this Act to the Code, see Short Title note set out under section 2000a of this title and Tables.

Executive Order 11478, as amended, referred to in subsecs. (c) and (e), is set out as a note under section 2000e of this title.

AMENDMENTS

1980 — Subsec. (a), Pub. L. 96-191 struck out "(other than the General Accounting Office)" following "in executive agencies".

EFFECTIVE DATE OF 1980 AMENDMENT

Amendment of Pub. L. 96-191 effective Oct. 1, 1980, see section 10(a) of Pub. L. 96-191.

TRANSFER OF FUNCTIONS

"Equal Employment Opportunity Commission" was substituted for "Civil Service Commission" in subsecs. (b) and (c) pursuant to Reorg. Plan No. 1 of 1978, § 3, 43 F.R. 19807, 92 Stat. 3781, set out as a note under section 2000e-4 of this title, which transferred all equal opportunity in Federal employment enforcement and related functions vested in the Civil Service Commission by subsecs. (b) and (c) of this section to the Equal Employment Opportunity Commission, with certain authority delegable to the Director of the Office of Personnel Management, effective Jan. 1, 1979, as provided by section 1-101 of Ex. Ord. No. 12106, Dec. 28, 1978, 44 F.R. 1053, set out as a note under section 2000e-4 of this title.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 5057 of this title; title 5 sections 2302, 7201, 7702, 7703; title 22 section 3905; title 29 section 794a.

§ 2000e-17. Procedure for denial, withholding, termination, or suspension of Government contract subsequent to acceptance by Government of affirmative action plan of employer; time of acceptance of plan

No Government contract, or portion thereof, with any employer, shall be denied, withheld, terminated, or suspended, by any agency or officer of the United States under any equal employment opportunity law or order, where such employer has an affirmative action plan which has previously been accepted by the Government for the same facility within the past twelve months without first according such employer full hearing and adjudication under the provisions of section 554 of

title 5, and the following pertinent sections: *Provided*, That if such employer has deviated substantially from such previously agreed to affirmative action plan, this section shall not apply: *Provided further*, That for the purposes of this section an affirmative action plan shall be deemed to have been accepted by the Government at the time the appropriate compliance agency has accepted such plan unless within forty-five days thereafter the Office of Federal Contract Compliance has disapproved such plan.
(Pub. L. 88-352, title VII, § 718, as added Pub. L. 92-261, § 13, Mar. 24, 1972, 86 Stat. 113.)

SUBCHAPTER VII — REGISTRATION AND VOTING STATISTICS

SUBCHAPTER REFERRED TO IN OTHER SECTIONS
This subchapter is referred to in section 2000h of this title.

§ 2000f. Survey for compilation of registration and voting statistics; geographical areas; scope; application of census provisions; voluntary disclosure; advising of right not to furnish information

The Secretary of Commerce shall promptly conduct a survey to compile registration and voting statistics in such geographic areas as may be recommended by the Commission on Civil Rights. Such a survey and compilation shall, to the extent recommended by the Commission on Civil Rights, only include a count of persons of voting age by race, color, and national origin, and determination of the extent to which such persons are registered to vote, and have voted in any statewide primary or general election in which the Members of the United States House of Representatives are nominated or elected, since January 1, 1960. Such information shall also be collected and compiled in connection with the Nineteenth Decennial Census, and at such other times as the Congress

may prescribe. The provisions of section 9 and chapter 7 of title 13 shall apply to any survey, collection, or compilation of registration and voting statistics carried out under this subchapter: *Provided, however,* That no person shall be compelled to disclose his race, color, national origin, or questioned about his political party affiliation, how he voted, or the reasons therefore, nor shall any penalty be imposed for his failure or refusal to make such disclosure. Every person interrogated orally, by written survey or questionnaire or by any other means with respect to such information shall be fully advised with respect to his right to fail or refuse to furnish such information.
(Pub. L. 88-352, title VIII, § 801, July 2, 1964, 78 Stat. 266.)

SUBCHAPTER VIII — COMMUNITY RELATIONS SERVICE

§ 2000g. Establishment of Service; Director of Service; appointment, term; personnel

There is hereby established in and as a part of the Department of Commerce a Community Relations Service (hereinafter referred to as the "Service"), which shall be headed by a Director who shall be appointed by the President with the advice and consent of the Senate for a term of four years. The Director is authorized to appoint, subject to the civil service laws and regulations, such other personnel as may be necessary to enable the Service to carry out its functions and duties, and to fix their compensation in accordance with chapter 51 and subchapter III of chapter 53 of title 5.
(Pub. L. 88-352, title X, § 1001(a), July 2, 1964, 78 Stat. 267; Pub. L. 95-624, § 5, Nov. 9, 1978, 92 Stat. 3462.)

References in Text

The civil service laws, referred to in text, are set forth in Title 5, Government Organization and Employees. See, particularly, section 3301 et seq. of that Title.

CODIFICATION

References to "chapter 51 and subchapter III of chapter 53 of title 5" and "section 3109 of title 5" substituted in text for "the Classification Act of 1949, as amended" and "section 15 of the Act of August 2, 1946 (60 Stat. 810; 5 U.S.C. 55a)", respectively, on authority of Pub. L. 89-554, § 7(b), Sept. 6, 1966, 80 Stat. 631, the first section of which enacted Title 5, Government Organization and Employees.

AMENDMENTS

1978 — Pub. L. 95-624 struck out provision authorizing the Director to procure the services of experts and consultants at rates for individuals not in excess of $75 per diem.

REORGANIZATION PLAN NO. 1 OF 1966

Eff. Apr. 22, 1966, 31 F.R. 6187, 80 Stat. 1607.

Prepared by the President and transmitted to the Senate and the House of Representatives in Congress assembled. February 10, 1966, pursuant to the provisions of the Reorganization Act of 1949, 63 Stat. 203, as amended [see U.S.C. 901 et seq.].

COMMUNITY RELATIONS SERVICE

SECTION 1. TRANSFER OF SERVICE

Subject to the provisions of this reorganization plan, the Community Relations Service now existing in the Department of Commerce under the Civil Rights Act of 1964 (Pub. L. No. 88-352, July 2, 1964) [see Short Title note under 42 U.S.C. 2000a], including the office of Director thereof, is hereby transferred to the Department of Justice.

SEC. 2. TRANSFER OF FUNCTIONS

All functions of the Community Relations Service, and all functions of the Director of the Community Relations Service, together with all functions of the Secretary of Commerce and the Department of Commerce with respect thereto, are hereby transferred to the Attorney General.

SEC. 3. INCIDENTAL TRANSFERS

(a) Section 1 hereof shall be deemed to transfer to the Department of Justice the personnel, property, and records of the Community Relations Service and the unexpended balances of appropriations, allocations, and other funds available or to be made available to the Service.

(b) Such further measures and dispositions as the Director of the Bureau of the Budget shall deem to be necessary in order to effectuate the transfers referred to in subsection (a) of this section shall be carried out in such manner as he shall direct and by as he shall designate.

90-74

No. 89-0054

In The

Supreme Court of the United States

October Term, 1989

BARBARA JACKSON,

Petitioner,

v.

HARVARD UNIVERSITY and JOHN McARTHUR,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW*

Was the district court clearly erroneous in finding that petitioner's evidence was insufficient to prove sex discrimination in violation of Title VII of the Civil Rights Act of 1964?

STATEMENT REQUIRED BY RULE 29.1

* Respondent Harvard University, whose corporate name is President and Fellows of Harvard College, has no corporate parent, and no subsidiary other than wholly owned subsidiaries and HACO, Inc.

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No. 89-9074

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Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

In 1973, petitioner joined the faculty of respondent Harvard University as an Assistant Professor of Business Administration at the Graduate School of Business Administration ("Business School" or "School"). In 1977, she was promoted to Associate Professor and in 1981 she was considered for a tenured appointment as Professor of Business Administration. Pet. App. B-35 to B-36.

In the words of the court of appeals (Pet. App. A-2), "Tenure decisions at the Business School are subject to an exacting protocol. A subcommittee comprised of four faculty members measures the aspirant against the prescribed standards and presents an advisory report to the

tenured faculty as a whole. The full faculty conducts its own review of the candidate. Two votes are taken by signed ballot, some weeks apart. While these tallies are not binding *stricto senso,* the dean will generally not recommend tenure to Harvard's president and governing boards unless a candidate commands substantial majority support within the faculty. As a practical matter, a decision by the dean not to recommend tenure is final." See also Pet. App. B-36 to B-38.

Petitioner failed to command the support of a substantial majority of the faculty when it voted on her candidacy in 1981 (Pet. App. B-38 to B-48), and respondent McArthur, Dean of the Business School, took the somewhat unusual step of offering her a chance to remain at the School, working to improve her record and trying again at a later time. Pet. App. B-48 to B-50. Petitioner accepted this offer, prepared a scholarly monograph, and in 1983 asked to be considered again on the basis of her monograph. Pet. App. B-50 to B-55.

Petitioner fared no better in her 1983 review. Many reviewers inside and outside the School "noted that the monograph seemed incomplete, inadequate, and hastily written" (Pet. App. B-56) – characterizations that petitioner did not dispute at trial. Pet. App. B-58. She received only a slim majority of favorable votes from the tenured faculty, well short of the substantial majority necessary for the Dean to recommend tenure to Harvard's President and Governing Boards. Dean McArthur notified her that he could not recommend tenure, and she resigned shortly afterwards. Pet. App. B-60 to B-64. This action followed.

Petitioner filed a single-count complaint of sex discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e et seq., and, following extensive discovery, the district court conducted an eight-day trial. The court issued a lengthy memorandum of findings of fact and conclusions of law (Pet. App. B-1 to B-95) and entered judgment for respondents. Pet. App. B-95.

The district court found that the issue of discrimination was "extraordinarily clear" (Pet. App. B-5) because the evidence so overwhelmingly favored Harvard:[1]

> The evidence presented satisfies me that the judgment not to recommend [petitioner] for tenure was not infected by considerations of gender in any way. It was instead a determination on the merits as to which a large number of people of good will differed without reference to improper considerations. There was no direct evidence of discrimination presented; * * * [n]or does any of the circumstantial evidence adduced by [petitioner] provide an alternative basis for finding a discriminatory cause in the denial of tenure. Pet. App. B-2 to B-3.
>
> * * *
>
> On their face, nothing in these proceedings fairly suggests [petitioner] was discriminated against on the basis of her sex in the Business School's tenure decision. * * * I have analyzed these matters in great detail and find nothing beneath the surface which supports [petitioner's] position. Pet. App. B-5.

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[1] The district court pointed out that not a single witness came forward to support petitioner's claim that she was denied tenure because of her gender. See Pet. App. B-63.

* * *

> In summary, there is in this case no basis on which to find gender discrimination against the plaintiff in her tenure review. * * * There is here insufficient – indeed virtually no – evidence that illicit discriminatory motives were at work. Thus I * * * must enter judgment for the [respondents]. Pet. App. B-6.

The court of appeals affirmed. Pet. App. A-1 to A-12. It concluded that petitioner's "core claim reduces to the assertion that, had the facts been judged properly, she would have prevailed" (Pet. App. A-5), but that "a painstaking canvass of the record intimates no hint of clear error" that F.R.C.P. 52(a) requires if the lower court's findings are to be disturbed. Pet. App. A-8. The court of appeals held that the district court had "correctly understood and applied the substantive and procedural rules for probing sex discrimination in the context of academic tenure disputes." Pet. App. A-7. See Pet. App. B-6 to B-13.

ARGUMENT

The judgment below was correct, and petitioner raises no issue worthy of this Court's review. Here, as in the court of appeals, petitioner "has done no more than dress * * * factual disputes in rather ill-fitting 'legal' costumery." Pet. App. A-6.

1. Petitioner argues (Pet. 8-13) that the district court and the court of appeals misapplied the *McDonnell Douglas-Burdine* analysis (*McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981)) by requiring petitioner to

"go beyond proving the articulated reason [of the respondents] false * * * [and] to prove that there was no other possible reason for the [respondents'] action other than sex bias." Pet. 9. In petitioner's view, the lower courts did this by deeming evidence of sex stereotyping "not relevant" (Pet. 11) and by requiring petitioner to "disprove every benign explanation for the outcome of the faculty deliberations" (Pet. 13) that led to the denial of tenure.

This contention is without foundation. The district court did not find that sex stereotyping was irrelevant; indeed, it admitted petitioner's evidence of alleged stereotyping and considered it in detail (Pet. App. B-64 to B-79). The court simply concluded that all the circumstantial evidence – including that of alleged stereotyping – was nothing more than a "a collection of attenuated, dated, and immaterial incidents and stray remarks, *de minimus* procedural anomalies, and inapposite comparisons with other tenure candidates." Pet. App. B-5. The court of appeals found this appraisal of the evidence "utter[ly] plausib[le]." Pet. App. A-7.[2] There is no

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[2] Petitioner's factual claims are, in any event, groundless. She argues (Pet. 10) that there was "highly significant" evidence of sex stereotyping because petitioner's "personality" was allegedly discussed more extensively than in the case of male candidates. As the district court noted, such an assertion, if true, would be some evidence of sex discrimination under *Price Waterhouse v. Hopkins*, No. 87-1167, ___ U.S. ___, 109 S. Ct. 1775, 1790-91 (1989) (plurality opinion), but petitioner "has not produced any evidence in support of her contention." Pet. App. B-79. While one professor testified that the faculty engaged in "much more discussion of [petitioner's] personality than in the usual case," the district court, addressing that testimony (Pet. App. B-78 to B-79), found that, taken as a whole, it did not establish any "gender-biased disparate treatment in [petitioner's] review." Pet. App. B-79.

(Continued on following page)

warrant for this Court to review this wholly fact-bound question of the sufficiency of the evidence.[3]

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Similarly, petitioner notes (Pet. 10) that an outside reviewer in 1981 was asked whether his strongly favorable review of petitioner's work was influenced by "affirmative action." (He replied that it was not.) The district court weighed this evidence (Pet. App. B-76 to B-78) and found, under all the circumstances, that it was "only marginally significant as circumstantial evidence of gender bias." Pet. App. B-78 (footnote omitted).

Petitioner also argues (Pet. 16) that the district court erred in not attaching controlling weight to the fact that the School refused to remove from her subcommittee a professor she claimed was biased against women. The district court found that the professor, with whom petitioner had co-authored a book, might at most have been biased against petitioner, but not for reasons of gender, and that the refusal to remove him played, in any event, "a *de minimus* role" in the outcome of the tenure decision. See Pet. App. B-74 to B-76.

Petitioner claims (Pet. 9-10, 12-13) that the district court erroneously "dismissed" (Pet. 12) testimony of Senior Associate Dean Donaldson that the Business School is not "wholly immune" from the attitudes of "society at large" that tend to resist women in untraditional leadership roles. Again, the district court considered this testimony in detail (Pet. App. B-70 to B-73), noting Donaldson's unequivocal assertions that the tenure process at the Business School "is as free of discrimination as it can be" (Pet. App. B-72) and that to his knowledge no faculty member had ever opposed any female candidate for tenure on the basis of sex (*ibid.*). The court concluded that Dean Donaldson had established a "race and gender neutral process" for tenure decisions and found his testimony "wholly credible" (Pet. App. B-73).

Finally, petitioner's argument that she qualified for tenure in 1981 and was denied it because of her gender (Pet. 16-17) is contrary to the factual findings of the district court. See Pet. App. B-38 to B-48.

[3] Petitioner takes exception (Pet. 11-12) to the district court's comment that disparate treatment analysis cannot

(Continued on following page)

2. Petitioner next claims (Pet. 13-15) that the district court erroneously allowed respondents to "change their articulated reason [for the denial of tenure] after discovery was concluded." Pet. 14. Petitioner's argument is that, during discovery, respondents asserted that she had been denied tenure because her scholarly qualifications were lacking (Pet. 14), but that "just as the trial was about to begin" the district court "allow[ed]" respondents to assert something different: that tenure was denied because "a substantial number of the members of the [tenured faculty] determined that [petitioner's] scholarship did not meet" the School's standards. Pet. 17.

There are several answers to this assertion. First, the petitioner's bifurcation of the "articulated reason" for denial of tenure is quite artificial. Respondents' reason, articulated throughout the litigation from answer to trial,

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"police" individual "subconscious stereotypes and prejudices" (Pet. App. B-73). The court's observation merely recognizes that Title VII regulates what people do, not what they hold in their subconscious. As a plurality of this Court stated in *Price Waterhouse v. Hopkins, supra,* ___ U.S. at ___, 109 S. Ct. at 1790-91, an employer who "*acts on* the basis of" sex stereotypes "has *acted on* the basis of gender." (Emphasis added.) Here, the district court, mindful of *Price Waterhouse* (see Pet. App. B-69, B-79), found that no one at the Business School had acted on the basis of stereotypes.

In that regard, we note that the district court certainly did not say, as petitioner claims, that Title VII "could not reach discrimination which was *the product of* 'subconscious stereotypes and prejudices'." Pet. 11 (emphasis added); see also Pet. 12. Nor did it say that "if a University's bias against women is the product of general societal attitudes it is not illegal." Pet. 12. See Pet. App. B-73.

was that petitioner's scholarship was deficient, as determined by the full faculty and reflected in its vote. As the district court put it (Pet. App. B-44): " * * * Harvard has articulated as the non-discriminatory reason for denying tenure * * * plaintiff's alleged failure to demonstrate sufficient creativity;" thus petitioner "was denied tenure in 1983 because she had failed to convince a substantial majority of the tenured faculty that she possessed the level of creativity required for tenure at the Business School." Pet. App. B-62.

Second, any change in Harvard's articulated reason, if petitioner had shown one, would have been a matter for the district court to weigh in appraising the credibility of Harvard's witnesses; it would not implicate the applicability of Title VII to academic tenure decisions, as petitioner claims. Pet. 18.

Finally, petitioner's preoccupation with *Burdine*'s "basic allocation of burdens and order of presentation of proof," *Burdine, supra,* 450 U.S. at 252, overlooks the fundamental principle that in Title VII cases "the McDonnell-Burdine presumption 'drops from the case' " when, as here, the defendant offers its evidence of the reason for its decision (*U.S. Postal Service Board of Governors v. Aikens,* 460 U.S. 711, 715 (1983), quoting *Burdine, supra,* 450 U.S. at 255). The district court must "decide the ultimate factual issue in the case," which is whether the defendant intentionally discriminated against the plaintiff. *Aikens, supra,* 460 U.S. at 715. Thus, when deciding whether the defendant discriminated, neither the trial court nor reviewing courts should "treat discrimination differently from other ultimate questions of fact." *Id.* at

716. Petitioner's contention that Harvard changed its story in mid-stream, therefore, is merely an argument that the district court should not have found Harvard's witnesses as credible as it did.

3. Petitioner's final claim (Pet. 17 n. 11 and 18-20) appears to be that the decision below conflicts with this Court's decision in *University of Pennsylvania v. EEOC*, No. 88-493, ___ U.S. ___, 110 S. Ct. 571 (1990), which held that a university has no constitutional or common law privilege to withhold tenure records from the EEOC in discrimination investigations. While Harvard did redact names and identifying data in some tenure records that it produced to petitioner[4], any potential error in this regard was cured when the district court at trial offered to "reopen[] discovery and allow[] [petitioner] to make further inquiry unconstrained by the limitations of an academic privilege." Pet. App. B-27. Petitioner "rejected the offer and chose * * * not to pursue further discovery." Pet. App. B-28; see also Pet. App. A-9. Thus she is in no position to complain that she was precluded from any evidence on grounds of academic privilege.

There is no foundation whatever for petitioner's closing assertion (Pet. 20) that the court of appeals has endangered the application of Title VII to academic tenure decisions. Shortly before its decision in this case, the court of appeals held that a tenure candidate at another

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[4] Contrary to petitioner's assertion (Pet. 19), Harvard did not "shield from discovery the how and why of individual votes." Petitioner was free to ask any individual faculty member how he or she voted on petitioner's candidacy, and why, and she exercised this opportunity freely during discovery.

university had been the victim of sex discrimination in violation of Title VII, and it affirmed a judgment that she be reinstated with tenure. *Brown v. Trustees of Boston University*, 891 F.2d 337 (1st Cir.1989), cert. denied, June 18, 1990 (No. 89-1680).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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